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In The

Supreme Court of The United States

October Term, 1971

No.

IN THE MATTER OF
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD
COMPANY, DEBTOR

Richard Joyce Smith, Trustee of the Property of The New York, New Haven and Hartford Railroad Company, Debtor,

PETITIONER

v.

George P. Baker, Richard C. Bond, Jervis Langdon, Jr. and Willard Wirtz, Trustees of the Property of Penn Central Transportation Company, Debtor; Manufacturers Hanover Trust Company, as Mortgage Trustee; and Penn Central Transportation Company;

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated: April 28, 1972

Bowne of Boston, Inc.

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OPINIONS BELOW

The United States Court of Appeals for the Second Circuit (the "Court of Appeals")[1] rendered its decision

[1] Other frequently used contracted forms of reference herein are:

The New York, New Haven and Hartford Railroad Company, Debtor, is referred to as "New Haven."

The Penn Central Transportation Company, Debtor, is referred to as "Penn Central."

The United States District Court for the District of Connecticut is referred to as "New Haven Reorganization Court."

The United States District Court for the Eastern District of Pennsylvania is referred to as "Penn Central Reorganization Court."

The Interstate Commerce Commission is referred to as "Commission."

March 17, 1972. The decision has not yet been reported. It appears at pages A-5 – A-24 of the Appendix filed herewith.

The Court of Appeals' decision reversed the decision of the New Haven Reorganization Court. *In the Matter of The New York, New Haven and Hartford Railroad Co.*, 330 F. Supp. 131, 331 F. Supp. 212 (D. Conn. 1971). The decision of the New Haven Reorganization Court is reprinted at pages A-25 – A-60 and the order at pages A-61 – A-65 of the Appendix.[2]

JURISDICTION

The Court of Appeals' decision is dated March 17, 1972. No mandate has been entered because, on April 6, 1972, the Court of Appeals granted the petitioner herein a 30-day stay of its mandate to permit filing of this Petition for Certiorari prior to the issuance of its mandate.

The jurisdiction of this Court is invoked under 28 U.S.C 1254 (1), 28 U.S.C 2101 (c) and Rule 19 of the Rules of this Court.

STATUTES INVOLVED

The following United States statutes are involved in this case and are printed in the Appendix at pages A-1 – A-4:

Section 77(a) of the Bankruptcy Act, 11 U.S.C 205(a).

Section 77(c)(6) of the Bankruptcy Act, 11 U.S.C 205(c)(6).

QUESTIONS PRESENTED

1. Where this Court directed the New Haven Reorganization Court to carry out its opinion and judgment in the *New Haven Inclusion Cases*, 399 U.S. 392 (1970), and

[2] The Penn Central Reorganization Court entered a decision and order, dated December 31, 1971 in related proceedings. *In the Matter of Penn Central Transportation Company, Debtor*, 337 F. Supp. 779 (E.D.Pa. 1972). The petitioner herein, and others, filed appeals therefrom to the United States Court of Appeals for the Third Circuit, where the time for filing appellants' briefs has been extended.

the opinion and judgment were entered *after*, and specifically referred to, the institution of Penn Central's reorganization proceedings under Section 77 of the Bankruptcy Act, and where the New Haven Reorganization Court had reserved jurisdiction in 1968 to adjudicate matters relating to the terms of the inclusion in Penn Central of the properties and rights required to be conveyed on December 31, 1968 by New Haven to Penn Central pursuant to orders of the Commission and the New Haven Reorganization Court,

(a) was the Court of Appeals correct in construing this Court's remand to the New Haven Reorganization Court in the *New Haven Inclusion Cases, supra*?

(b) was the Court of Appeals correct in holding that the order of the New Haven Reorganization Court conflicted with the "exclusive jurisdiction" of the Penn Central Reorganization Court and "could . . . seriously impair the formulation of a workable plan for the financial resuscitation of Penn Central by the Commission and the ability of the Pennsylvania Reorganization Court to administer the entire Penn Central system," when its only possible effect on the Penn Central reorganization will be to limit what this Court had already held constitutionally impermissible, namely the further erosion of the New Haven creditors' security?

(c) was the Court of Appeals correct in holding, under its reading of *Warren v. Palmer*, 310 U.S. 132 (1940), that the New Haven Reorganization Court had no jurisdiction pursuant to this Court's remand or its own prior reservation of jurisdiction to enter orders to protect the constitutional rights of the New Haven's creditors, where the Commission lacked jurisdiction to provide such protection, which this Court had previously adjudicated?

(d) was the Court of Appeals correct in holding, under its reading of *Warren v. Palmer, supra*, that the New Haven Reorganization Court had, in essence, been ousted from all jurisdiction over the New Haven reorganization and could neither adjudicate threshold legal issues for the guidance of the Commission in formulating a new plan of reorganization for the New Haven, nor even review the terms of such New Haven plan, when so formulated under Section 77 of the Bankruptcy Act?

2. Where this Court had disaffirmed in its opinion and judgment only that portion of the New Haven Reorganization Court's order which had established an "underwriting plan" to secure the payment to New Haven from Penn Central for the properties and rights required to be conveyed on December 31, 1968, and such disaffirmance was specifically on the sole ground that the Penn Central bankruptcy had rendered the underwriting unworkable as a security measure,

(a) did the New Haven Reorganization Court have jurisdiction under this Court's remand to declare different security measures found necessary to protect the New Haven's constitutional right to receive payment for the properties and rights so conveyed?

(b) if it had such jurisdiction, was the New Haven Reorganization Court correct in adjudging that an equitable lien and constructive trust arose, as of the date of conveyance, on (and limited to) the properties and rights required to be conveyed by New Haven to Penn Central?

STATEMENT OF THE CASE

The New Haven has been in reorganization under Section 77 of the Bankruptcy Act since July 7, 1961 in the New Haven Reorganization Court. Circuit Judge Robert P. Anderson, sitting first as Chief Judge of the District Court for the District of Connecticut and then, after his appointment to the Court of Appeals, by designation, has exercised jurisdiction over the New Haven reorganization since its inception. Three trustees were appointed initially; Richard Joyce Smith is the sole remaining trustee.

The Commission, by Report and Order dated November 25, 1968, 334 I.C.C. 25, approved a plan of reorganization for the New Haven which it certified to the New Haven Reorganization Court on December 2, 1968. In its opinion of March 17, 1972, the Court of Appeals misunderstood the nature of the proceedings before the New Haven Reorganization Court, stating: "The Commission has never proposed a reorganization plan for the New Haven itself" (A-6). In the *New Haven Inclusion Cases, supra*, this Court, however, recognized that the inclusion of the New Haven's operations in the proposed Penn Central system was the Commission's plan of reorganization for the New Haven, pointing out that "the Commission certified the first step of *its plan* for the reorganization of the New Haven — the sale of its assets to Penn Central — to the reorganization court" on March 29, 1968, 399 U.S. at 413 (emphasis added). On August 13, 1968, as this Court further pointed out, the New Haven Reorganization Court "independently returned *the Commission's plan* for further proceedings," 399 U.S. at 414 (emphasis added). Thereafter, again as pointed out by this Court, "the Commission certified *its revised Plan* to . . . [the New Haven Reorganization Court] on December 2, 1968," 399 U.S. at 416 (emphasis added).

The plan then certified by the Commission provided for inclusion of the New Haven's operating assets in Penn

Central for a consideration to be paid by Penn Central which the Commission found would equal the estimated liquidation value of the assets. The Court of Appeals correctly stated that a Purchase Agreement had previously been entered into among the New Haven Trustees and representatives of the Pennsylvania and New York Central Railroads subject to the approval of the Commission and the New Haven Reorganization Court (A-6). It was incorrect, however, in assuming (as appears to be indicated in its opinion of March 17, 1972 at A-6) that the New Haven Reorganization Court at any time approved the Purchase Agreement as the basis for inclusion of the New Haven in Penn Central. In fact, Judge Anderson rejected the terms of the Purchase Agreement, *In re New York, New Haven and Hartford Railroad Co.*, 289 F. Supp. 451 (D. Conn. 1968), after they had been adopted by the Commission in its first plan of reorganization for the New Haven, 331 I.C.C. 643 (1967). As this Court pointed out in 1970 in the *New Haven Inclusion Cases, supra*, the New Haven Trustees "never submitted the [Purchase] Agreement to that Court [the New Haven Reorganization Court] for its approval." 399 U.S. at 410, n. 46.

The inclusion was ordered by the Commission to take place by January 1, 1969, a date which recognized the New Haven Reorganization Court's earlier finding that continued erosion of the estate from operational losses after that date would constitute an unconstitutional public taking of the New Haven's property without just compensation. 289 F. Supp. at 459.

The New Haven Reorganization Court set December 11, 1968 as a deadline for the filing of objections to the Commission's plan, and fixed December 20, 1968 for a hearing with respect to it. New Haven bondholders interests[3]

[3] Manufacturers Hanover Trust Company, as trustee under the New Haven's First and Refunding Mortgage; the First Mortgage 4% Bondholders' Committee; Oscar Gruss and Son; and Chase Manhattan Bank, N.A., as trustee under the New Haven's General Income Mortgage.

filed extensive objections to the terms determined by the Commission. Penn Central contended that the inclusion should not go forward until the terms of the inclusion had been finally determined.[4]

The bondholders' and Penn Central's objections notwithstanding, the Commission urged that the public interest required inclusion to be effected, with the terms to be reviewed thereafter. (Hearing before New Haven Reorganization Court, December 20, 1968, Transcript, p. 50). By Order No. 559, dated December 24, 1968, the New Haven Reorganization Court approved the Commission's order and ordered the New Haven to make the conveyance, and to accept *pro tanto* the payment of the consideration provided in the Commission's Report and Order. The New Haven Reorganization Court specifically reserved jurisdiction in Order No. 559, as follows:

> "It is *Ordered, Adjudged and Decreed* that the order of the Commission relating to inclusion of Debtor's railroad operations in Penn Central Company on or before January 1, 1969 by conveyance of the Debtor's assets to Penn Central Company and payment of consideration therefor by Penn Central Company, as specified in the Plan, *subject to the jurisdiction reserved in this Order*, is affirmed and the parties are directed to implement said inclusion and payment in compliance with the Commission's order as follows:
>
> * * *
>
> "J. The conveyance of the Debtor's assets by the New Haven Trustee and the payment of consideration by Penn Central Company, as provided herein, shall be without prejudice to the rights of any party to contest the fairness and adequacy of the consideration *and the*

[4] At that time, as this Court subsequently noted: "A condition of . . . [the Penn Central] merger was Penn Central's promise to take in the . . . [New Haven] as an operating entity . . . ." *New Haven Inclusion Cases*, 399 U.S. at 398-399.

other terms of inclusion of the Debtor's operation in Penn Central Company.

"K. *The Court hereby reserves jurisdiction to adjudicate all objections and claims for equitable treatment heretofore filed* herein except that all objections to the inclusion of the Debtor's operations in Penn Central Company as of December 31, 1968 are hereby overruled and denied." (emphasis added)

Penn Central filed a petition for review of the Commission's Order by a statutory three-judge court, and sought, but was denied, an order from that court staying the inclusion. Penn Central did not appeal from the three-judge court order, nor from the New Haven Reorganization Court's Order No. 559.

A description of the background of the inclusion proceedings, the terms of the inclusion, and the subsequent judicial proceedings is set forth in the *New Haven Inclusion Cases*, 399 U.S. at 413-430.

The New Haven's assets were conveyed to Penn Central on December 31, 1968 pursuant to the orders of the Commission and the New Haven Reorganization Court. Subsequently, hearings were resumed by the New Haven Reorganization Court to deal with the issues raised concerning the terms of inclusion. Hearings also commenced before a three-judge district court in the Southern District of New York, to which the New Haven bondholder groups had appealed from the Commission's order.

The New Haven Reorganization Court rejected the Commission's valuation findings, ruling the New Haven's assets to be worth some $29 million more than that determined by the Commission. The New Haven Reorganization Court also met the contentions of the New Haven bondholder groups that they were insecure under the inclusion terms; it did so by formulating and requiring, on its own initiative and as a condition to Section 77's required finding

of fairness and equity, an "underwriting plan" to secure payment to the New Haven equal to the value of the assets conveyed to Penn Central.[5] *In re New York, New Haven and Hartford Railroad Co.*, 304 F. Supp. 793, 809 – 810 (D. Conn. 1969).

In its review, the three-judge court, while finding that the Commission's undervaluation was only $990,000, agreed with and also adopted the New Haven Reorganization Court's security device of an underwriting plan to insure that the New Haven would be fully paid for the assets conveyed. *N.Y. N.H. & H.R. Co. Bondholders' Committee v. United States*, 305 F. Supp. 1049 (S.D.N.Y. 1969).

The conflicting decisions of the two district courts were then reviewed by this Court in expedited proceedings. This Court held that the New Haven Reorganization Court was the court of primary jurisdiction, affirming its decision as to the value of the assets sold to Penn Central and as to the constitutional rights of the New Haven creditors to receive payment which represented the fair equivalent in value of those assets. However, after argument in this Court but before its decision, Penn Central itself instituted reorganization proceedings under Section 77 on June 21, 1970, in the United States District Court for the Eastern District of Pennsylvania. This Court stated that, were it not for Penn Central's bankruptcy, it would have affirmed the New Haven Reorganization Court's decision *in toto:*

> "On the basis of the record before the District Court [the New Haven Reorganization Court] at the time of

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[5] The plan provided that Penn Central would pay part of the consideration in the form of common stock (over 950,000 shares), valued by the Commission at $87.50 per share. Since the stock had not yet reached that price on the New York Stock Exchange, the New Haven Reorganization Court provided, in essence, in the underwriting plan that if the stock should not reach that value by February 1, 1978, the New Haven would be entitled to the difference between $87.50 per share and the value of the stock at the conclusion of the underwriting period. *New Haven Inclusion Cases*, 399 U.S. at 486-487.

its order, *we would have no hesitancy in accepting its* findings, conclusions, and *proposed underwriting plan* as consistent with the history of the reorganization proceedings and supported by substantial evidence." 399 U.S. at 488 (emphasis added).

However, specifically in the light of the Penn Central's bankruptcy, this Court disaffirmed the underwriting plan, stating:

"But we cannot avoid the impact of recent events in assessing the propriety of the decree that that court [the New Haven Reorganization Court] has entered. See *United States v. Aluminum Co. of America*, 148 F.2d 416, 445. And those events make it possible that this aspect of the reorganization court's decree may be wholly unrealistic.

"The fairness and equity that are the essence of a §77 proceeding forbid our approval of a payment for the transferred New Haven properties that may be worth only a fraction of its purported value." 399 U.S. at 488.

* * *

"Accordingly, we set aside the order of the Connecticut District Court insofar as it determines that an intrinsic value of $87.50 inheres in the Penn Central common stock and implements *an underwriting plan to secure payment of that sum.*" 399 U.S. at 489 (emphasis added).

Upon receipt of this Court's mandate, the New Haven Reorganization Court, by Order dated August 10, 1970, directed the New Haven Trustee to file a statement of position with respect to the provisions that should be included in the order of remand to the Commission, and provided an opportunity for all interested persons thereafter

to state their positions in light of that taken by the New Haven Trustee.[6] During the course of the ensuing proceedings, the New Haven Trustee took the position, *inter alia*, that pending payment for the properties and rights required by the Commission and The New Haven Reorganization Court to be conveyed to Penn Central on December 31, 1968, the order on remand to the Commission should declare that the property so conveyed was impressed with an equitable lien and that the rights in the so-called Grand Central Terminal Properties and the income therefrom conveyed at the same time were subject to a constructive trust. The underlying reason for this position was to protect the constitutional rights of the New Haven bondholders found by this court.

The New Haven Reorganization Court entered its Memorandum of Decision on June 11, 1971, 330 F. Supp. 131 (A-26 – 60) and its order on June 22, 1971, 331 F. Supp. 212 (A-61 – 65), holding that it had jurisdiction to adjudicate the issues before it and declaring the exist-

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[6] The New Haven Trustee was required to state his position as to six designated subjects: (1) Step II of the plan of reorganization for the New Haven, which deals with the distribution among the New Haven's creditors; (2) the extent and nature of the New Haven Reorganization Court's directions, if any, to the Commission on the remand; (3) declaration of an equitable lien; (4) payment over to the New Haven Trustee of proceeds of sales of mortgaged property on deposit with the indenture trustee under the mortgage securing the Penn Central bonds held by the New Haven Trustee; (5) declaration of a constructive trust; and (6) consummation of the plan of reorganization for Boston and Providence Railroad Corporation. Two of these matters were subsequently resolved and were not treated with in the June 22, 1971 Order of the New Haven Reorganization Court. These involved agreements reached between the New Haven Trustee and the Penn Central Trustees, that were approved by the respective reorganization courts, so that $18 million on deposit under the mortgage securing the Penn Central bonds held by the New Haven Trustee was divided between the two estates; and the acceptance by the Penn Central Trustees of responsibility for carrying out the plan of reorganization for Boston and Providence Railroad.

ence of an equitable lien and constructive trust.[7] The equitable lien was impressed on all the tangible property conveyed to Penn Central with the exception of rolling stock and property theretofore sold by Penn Central. 331 F. Supp. at 215 (A-64). The constructive trust applied to the former right, title and interest of the New Haven in the "Grand Central Terminal Property," but was limited in amount to $28,438,000 plus interest, 331 F. Supp. at 215, 216 (A-64 - 65), the amount upheld by this Court, in affirming the New Haven Reorganization Court, as the value of the New Haven's interest in those properties. 399 U.S. at 445-451.[8]

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[7] On June 21, 1971, upon petition of the Penn Central Trustees, the Penn Central Reorganization Court entered an injunction restraining the New Haven Trustee and others from taking any action pursuant to the Memorandum of Decision or any order entered thereon "to enforce, collect or cause to be perfected or paid any claim against" Penn Central. The Penn Central Reorganization Court also asserted jurisdiction to adjudicate the merits of the equitable lien and constructive trust. The New Haven Trustee and others appealed therefrom to the United States Court of Appeals for the Third Circuit, asserting that the petition of the Penn Central Trustees constituted an impermissible collateral attack on the June 11, 1971 decision of the New Haven Reorganization Court. By decision and order dated December 31, 1971, the Penn Central Reorganization Court extended the injunction and ruled that, pending final resolution of the New Haven estate's entitlement to a security interest in its former property, referring in passing to the proceedings then pending before the Court of Appeals for the Second Circuit (to which this petition for certiorari is addressed), the New Haven Trustee would be deemed to have a tentative lien, "indeterminate in amount, upon all real property and all readily identifiable personal property (except rolling stock) conveyed to the Penn Central as of December 31, 1968, which were still in possession of the Debtor's estate on June 11, 1971," *In the Matter of Penn Central Transportation Company, Debtor*, 337 F. Supp. at 790.

The New Haven Trustee has also appealed that decision to the United States Court of Appeals for the Third Circuit, for the reason, *inter alia*, that it is based upon an impermissible collateral attack on the judgment of the New Haven Reorganization Court; and that the New Haven Reorganization Court's adjudication of an equitable lien and constructive trust was obviously fair and equitable under the circumstances of this case for the reasons stated in Judge Anderson's opinion.

[8] In its Order on Remand, 331 F. Supp. 212 (A-61 — 65), the New Haven Reorganization Court credited against the $174.6 million owed to the New Haven estate some $41.9 million that had heretofore been paid by Penn Central in the form of cash, assumption of liabilities, and cancellation of indebtedness, leaving a balance owed the New Haven estate of $132.7 million. It ruled that the Penn Central stock and bonds that had been delivered to the New Haven, in accordance with the Commission's terms for inclusion, were to be deemed held as security for payment of the balance.

The New Haven Reorganization Court understood this Court's mandate as requiring its adjudication of threshold legal issues before remanding the case to the Commission:

> "This court has the exclusive jurisdiction to determine the effect of the Supreme Court's mandate in the *New Haven Inclusion Cases*, and this court must decide what is to be done to implement it. The full price required to be paid for the New Haven's assets was decided, but the terms of payment were not; and this court alone must review and determine what means, pursuant to the Supreme Court's mandate, are proper. The I.C.C. cannot adjudicate the issues of law now before this court, for these lie outside its jurisdiction. . . .
>
> "So here, the Commission has no jurisdiction to decide the legal questions of the New Haven's status, whether as that of a stockholder or creditor, including the type of creditor, and the further related question as to whether or not the New Haven estate has a full security interest in its former properties for the balance of the purchase price. These are legal questions which are for this court in construing the Supreme Court's mandate. In the circumstances of this case ordinary sense and logic call for a resolution of these paramount issues before remand of the case to the I.C.C. in order that it may proceed with prior knowledge of how the legal questions have been adjudicated. 330 F. Supp. at 136-137 (A-28 – 29).

While then adjudicating that an equitable lien and constructive trust existed, the New Haven Reorganization Court did not enter any order which enforced the lien or trust (providing only that a formal accounting of the income subject to the trust was required), stating:

> ". . . the Penn Central reorganization court will remain wholly in control of the effect, if any, of such a lien on the operations of the railroad and on its reorganization plan formulation." *Id.* at 137 (A-31).

The Penn Central Trustees, Manufacturers Hanover Trust Company, as trustee under the New York Central and

Hudson River Railroad Co. Gold Bond Mortgage, and Penn Central Transportation Company appealed to the Court of Appeals for the Second Circuit. The Court of Appeals' decision reversed the New Haven Reorganization Court on jurisdictional grounds and directly remanded the case to the Commission.[9]

The Court of Appeals recognized that the New Haven Reorganization Court had specifically held that it had jurisdiction to enter its order. The Court of Appeals summarized four bases upon which it had been contended that jurisdiction could be premised, as follows: "First . . . the 'exclusive jurisdiction' provision of §77 (a) cannot be read literally, and the . . . [New Haven Reorganization Court's] action comports with the policy underlying that section. Second . . . [the New Haven Reorganization Court] had jurisdiction to implement the Supreme Court's mandate in the *New Haven Inclusion Cases*. Third . . . [the New Haven Reorganization Court] reserved jurisdiction, in its order authorizing the transfer of the New Haven estate's assets, over the property so transferred. Finally . . . [the New Haven Reorganization Court] had *in personam* jurisdiction over the Penn Central trustees and thus had the power to adjudicate the rights of the parties in property not located within the court's territorial jurisdiction." (A-11).

The Court of Appeals rejected all four bases of jurisdiction, wholly relying on its view of the rationale of *Warren v. Palmer, supra*.[10] It did not find that the New Haven Reorganization Court's order *would*, but only, despite its clear statement of intent that enforcement of the security and control over rail operations would remain in the Penn Central Reorganization Court, that such order *could:*

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[9] "Reversed and remanded to the Interstate Commerce Commission" (A-19).

[10] See page 23, *infra*.

> " . . . at this stage of the Penn Central reorganization proceedings, seriously impair the formulation of a workable plan for the financial resuscitation of Penn Central by the Commission and the ability of the Pennsylvania reorganization court to administer the entire Penn Central system, of which the New Haven line is but a division . . ." (A-16).

This finding, even as limited by the Court of Appeals to an area only of possibility of interference, was without the support of any evidentiary record. Further, in his concurring opinion, Judge Mansfield watered down even the possibility of any interference, characterizing the effect of the security, as follows:

> "Although the creation of a lien and a constructive trust upon assets of the Penn Central might not have the immediate effect of disrupting that court's operation of the railroad, such action *could pose the threat* of doing so." [11] (A-20) (emphasis added.)

The Court of Appeals held, under *Warren v. Palmer, supra*, that the New Haven Reorganization Court had been ousted from substantially *all* jurisdiction over the New Haven reorganization proceedings by the adjudication of Penn Central's bankruptcy (A-13; A-16). The Court of Appeals held that a plan of reorganization for the New Haven should be formulated by the Commission only in conjunction with a plan of reorganization for Penn Central and,

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[11] The "threat" of interference referred to by Judge Mansfield could, if at all, only concern the constructive trust on one half the "excess income" from the Park Avenue properties, since the order of the New Haven Reorganization Court regarding the equitable lien required no act by the Penn Central Trustees. It is significant, therefore, that the Penn Central Trustees have stated subsequently in petitions to the Penn Central Reorganization Court for approval of the sale of certain of the Park Avenue properties, that the properties and income from such properties "are not required by the [Debtor's] Trustees in the operation of the Debtor's railroad or in the conduct of the Debtor's transportation business." (Penn Central Trustees' petitions attached to Order No. 605, dated March 13, 1972, of the Penn Central Reorganization Court.)

in effect, that the Penn Central Reorganization Court alone had jurisdiction to pass upon the fairness and equity of the New Haven's reorganization plan (A-18 – 19). It remanded "the case to the Interstate Commerce Commission with directions to consider, in light of the Penn Central reorganization, the form of consideration the New Haven estate should receive" [12] (A-19).

The Court of Appeals stressed that its reversal of the New Haven Reorganization Court was limited to its disagreement as to jurisdiction:

> "We do not imply by this remand that we disagree either with the fairness of Judge Anderson's order or with his conclusion that the Supreme Court's opinion in *New Haven Inclusion Cases* requires that the New Haven estate receive $174.6 million as compensation for the taking of its property. We hold only that the Connecticut reorganization court is not the proper body to grant whatever protection is required because it has no jurisdiction . . . " (A-19).

While thus refraining from an adjudication as to the merits of the New Haven Reorganization Court's judgment, the effect of the jurisdictional holding, nevertheless, is to deprive the New Haven of the security which was deemed necessary by the New Haven Reorganization Court to meet the requirements of the remand by this Court. Thus, the substantive impact of the Court of Appeals' decision is to continue without any protection for an indefinite period the creditors' rights which, in the *New Haven Inclusion Cases, supra*, this Court held must under the Constitution be adequately safeguarded.

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[12] Judge Mansfield did not concur in this holding, stating ". . . I do not agree that the Commission and the Pennsylvania Court have the power unilaterally and without approval of the Connecticut court to determine the form of the consideration that is to be paid to the New Haven estate and its creditors for the assets transferred to the Penn Central." (A-20)

REASONS FOR GRANTING THE WRIT

Summary

This Court should grant certiorari because the central issues in this case concern the proper construction and implementation of this Court's mandate in the *New Haven Inclusion Cases, supra.* Utterly divergent decisions interpreting that mandate have been rendered by the New Haven Reorganization Court and the Court of Appeals. Only this Court can construe its mandate with finality.

This case also involves important questions of railroad reorganization law which have not heretofore been considered and which ought to be decided by this Court. The issues include matters pertinent to the public interest in soundly financed railroads and such matters of expressed national transportation policy as

> " . . . promot[ing] the public interest in increased stability of values of railroad securities with resulting greater confidence therein of investors, . . . assur[ing], insofar as possible, continuity of sound financial condition of common carriers [and] . . . enhanc[ing] the market ability of railroad securities . . . " 49 U.S.C.A. 20b, Historical Note.

If the Court of Appeals decision is allowed to stand, the public interest in carrying out the national transportation policy will be adversely affected. There are currently six pending major Section 77 reorganizations[13] in the Northeast alone, and the issues raised by the Court of Appeals' decision have substantial relevance not only to the rights of holders of railroad securities in these reorganizations, but are related directly to the future ability of all railroads economically and efficiently to finance their operations. This

[13] The New York, New Haven and Hartford Railroad Company, Penn Central Transportation Company, Boston and Maine Corporation, Central Railroad Company of New Jersey, Lehigh Valley Railroad Company and Reading Company.

Court should grant certiorari to resolve the conflicts between the decisions of the Court of Appeals and the decisions of this Court both in the *New Haven Inclusion Cases, supra*, and in *Warren v. Palmer, supra*, and to scrutinize carefully the ouster of the New Haven Reorganization Court of substantially all of its reorganization jurisdiction, including the power to protect the New Haven estate through the security devices of an equitable lien and constructive trust.

In brief, the decision of the Court of Appeals misconstrues this Court's mandate; invades the constitutional rights of the New Haven creditors; misapplies *Warren v. Palmer, supra;* ousts the New Haven Reorganization Court of substantive jurisdiction over the New Haven reorganization; produces an unjust enrichment of other Penn Central creditors; and leaves the New Haven estate at the mercy of an eroding and wasting Penn Central estate.

1. *Only This Court Can Construe With Finality Its Opinion and Judgment in The New Haven Inclusion Cases, Supra, and Can Set Forth Its Intention in Directing Its Remand to The New Haven Reorganization Court.*

This Court rendered its opinion in the *New Haven Inclusion Cases, supra*, on June 29, 1970, and remanded the case to the New Haven Reorganization Court. Penn Central had gone bankrupt on June 21, 1970. Cognizant of this Court's approval in the *New Haven Inclusion Cases, supra*, of his role ("The chancellor remains 'a necessary and important factor in railroad reorganization,'" 399 U.S. at 433), Judge Anderson presided over proceedings for some ten months with respect to what could and should be done pursuant to the remand and the Penn Central's bankruptcy. Following those proceedings Judge Anderson entered his opinion and order adjudging an equitable lien and construc-

tive trust on the former New Haven property to protect the New Haven estate and its creditors, and to prevent Penn Central's other creditors from being unjustly enriched.

The Court of Appeals reversed, holding that the New Haven Reorganization Court had no jurisdiction under the mandate by reason of the superior jurisdiction of the Penn Central Reorganization Court, and was powerless to declare the security measures constituted by the equitable lien and constructive trust. Yet this Court, with full knowledge of and specific reference to the pendency of the Penn Central reorganization proceedings, *New Haven Inclusion Cases, supra*, 399 U.S. at 399 n., remanded the case to the New Haven Reorganization Court (and not to the Commission or the Penn Central Reorganization Court). Only this Court can clarify whether it intended the court to which it directed its mandate to have jurisdiction limited solely to a ministerial forwarding of this matter to the Commission and, thereafter, to be barred from all substantive implementation of the mandate.

The New Haven Reorganization Court considered that the mandate required it, in remanding the case to the Commission, to adjudicate pertinent threshold legal issues, noting that the Commission has itself held that it had no power to adjudicate legal rights *inter partes, Boston and Providence Railroad Reorganization Proceedings*, 290 I.C.C. 363, 382 (1954); 327 I.C.C. 10, 15 (1966).[14] It also considered that it had been directed to formulate an appropriate security device to replace the "underwriting plan" which had been rejected by this Court. The "underwriting plan," which had itself been the invention of the New Haven Reorganization Court in the earlier phase of the pro-

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[14] See also this Court's opinion in the *New Haven Inclusion Cases* on the extraordinary powers of a Section 77 reorganization court and on the Commission's lack of power to decide legal issues. 399 U.S. at 433-434, 442.

ceeding (and was then accepted by the Commission without any further administrative findings), was specifically found by this Court not to provide adequate security for the very reason that the Penn Central reorganization had been instituted. *New Haven Inclusion Cases*, 399 U.S. at 488, 489. Accordingly, only this Court can resolve whether the New Haven Reorganization Court's formulation of new security measures, as well as whether the measures which it formulated, were a proper fulfillment of its responsibilities under this Court's mandate, Section 77, and its own retained jurisdiction.

2. *The New Haven Reorganization Court Had Jurisdiction Under This Court's Remand to Protect The Constitutional Rights of The New Haven Creditors, and The Equitable Lien and Constructive Trust Were Appropriate Security Devices for That Purpose.*

Constitutional rights of secured creditors of the New Haven estate as to the former New Haven property, previously determined by this Court, may be irreparably impaired by any delay in resolution of the issues in the case at bar.

There has been a material and continuing erosion of Penn Central assets during its operation in reorganization. In the absance of a determination that the New Haven has at least a security interest (even one, as here, which is wholly limited in extent to the New Haven's own former property for which it has not received the payment found by this Court to be fair and equitable), the continuing erosion of the Penn Central estate will necessarily visit a disproportionate and permanent reduction in the New Haven's claim vis-a-vis other secured creditors. Recognizing the strictures of *Warren v. Palmer, supra*, against interfering with Penn Central *operations*, the equitable lien and constructive trust were among a severely limited group of, if not the only, mea-

sures available to the New Haven Reorganization Court to protect the New Haven creditors' rights against those of other creditors of Penn Central seeking the benefit of the former New Haven assets.

In the *New Haven Inclusion Cases*, *supra*, this Court held (affirming the judgment of the New Haven Reorganization Court) that the New Haven creditors have suffered all the losses they were required to suffer in the public interest and that any further losses would be an unconstitutional taking of their property without just compensation, 399 U.S. at 466. This Court stated that no further loss by the New Haven creditors could be sustained under any construction of the Bankruptcy Act, *Id.* at 467.

Acting pursuant to the mandate, and aware of the Commission's lack of legal power to declare security interests in the former New Haven property to protect the creditors' constitutional rights to be paid therefor, the New Haven Reorganization Court considered it was required to formulate new security measures to replace the disaffirmed "underwriting plan." In devising the new security measures, the New Haven Reorganization Court fully appreciated that the security devices would not carry complete assurance of payment and that the ostensible conflict between the "exclusive jurisdiction" of the two reorganization courts over the same *res* must be avoided. Thus, it was careful to find the path which would avoid any actual, or even any reasonably warranted inference of, interference with the Penn Central Reorganization Court's control over Penn Central's operations, pointing out that:

> " . . . the Penn Central reorganization court will remain wholly in control of the effect, if any, of such a lien on the operations of the railroad and on its reorganization plan formulation." 330 F. Supp. at 137 (A-31).

A significant constitutional question is raised whether there is an interference as a matter of law with the *operations* of Penn Central, as found by the Court of Appeals, from the provision of the security protection afforded by the equitable lien and constructive trust. This security protection will clearly be particularly important during the time it will take the Commission to formulate a final plan of reorganization for the New Haven and for that plan to be approved, confirmed and consummated. The question whether creditors who have been found to have sustained the constitutional limits of permissible loss in one railroad reorganization are obliged to subject their remaining assets to the risk of further loss in the reorganization operations of a second railroad because the public interest required their rail assets to continue to be operated by the second railroad, fairly should be resolved as quickly as possible.

The Court of Appeals' failure to pass on the substantive issue, and the resulting lack of security for the New Haven's constitutional right to receive payment, will result in a windfall for other Penn Central creditors who will reap the benefits (even as to proceeds of sale) of the former New Haven assets, without ever having paid for those assets. Further, if the New Haven estate is not now protected by adequate security measures during the time a plan of reorganization for Penn Central is being formulated and approved, the New Haven estate might be so eroded as to leave nothing for New Haven creditors, except those qualifying as administration claimants in the New Haven reorganization proceedings. It is thus imperative for the protection of the New Haven bondholders for this Court to grant certiorari to adjudicate now the merits of the equitable lien and constructive trust as security measures implementing this Court's mandate to protect the New Haven creditors' constitutional rights.

3. The Court of Appeals Misapplied Warren v. Palmer and Misconstrued its Application to the Respective Roles of the Reorganization Courts and the Commission.

In *Warren v. Palmer, supra*, this Court held that, where one reorganization court had authorized the rejection of a leased line but the debtor was required to continue operations on that line, the reorganization court charged with operations could impose a lien on the former leased line to protect the debtor from operational losses, although the lessor was itself in reorganization under Section 77 in another court.

The New Haven Reorganization Court concededly had jurisdiction over the New Haven properties for the more than seven years prior to the conveyance of the properties to Penn Central on December 31, 1968, and clearly and specifically retained jurisdiction in its order authorizing the conveyance to adjudicate subsequently matters relating to the purchase price to be paid by Penn Central. This retained jurisdiction was recognized by this Court when it sent its mandate to the New Haven Reorganization Court. The Court of Appeals' decision, which relies on *Warren v. Palmer, supra*, to oust the New Haven Reorganization Court of its primary jurisdiction over the New Haven reorganization proceedings, raises questions of far reaching importance of railroad reorganization law and the relationship between courts having concurrent jurisdiction over the same *res*. Clarification of the scope of application of *Warren v. Palmer, supra*, which, contrary to the view of the Court of Appeals here, indeed preserved concurrent jurisdiction of two railroad reorganization courts, is desirable.[15]

[15] The concurring opinion, while refusing to go so far as the majority and which attempted to find, without prescription, some continuing jurisdiction for the New Haven Reorganization Court, actually creates an even more difficult legal issue. It would relegate to the Commission, in effect, the power to determine which district court has what jurisdiction in the subsequent proceedings affecting the New Haven (A-23 — 24).

In the instant case, the New Haven Reorganization Court carefully applied *Warren v. Palmer, supra*, and protected the Penn Central Reorganization Court's control over Penn Central *operations* of the former New Haven properties by specifically providing that the equitable lien and constructive trust on such properties could be enforced only in that court. The disagreement of the Court of Appeals with this reasonable and functional application of the decision in *Warren v. Palmer, supra*, should be reviewed and rejected.

The distinctions between the respective functions of the Commission and a reorganization court as to the same *res* were set forth by this Court by its opinions in *Ecker v. Western Pacific R. Corp.*, 318 U.S. 448 (1943), and the *New Haven Inclusion Cases, supra*. This necessary kind of delineation is presently lacking, however, where the respective functions of two reorganization courts are involved. The present case squarely raises issues which test the degree to which *Warren v. Palmer, supra*, may, if at all, be extended. Contrary to the unqualified, simplistic application of *Warren v. Palmer* by the Court of Appeals, the New Haven Reorganization Court's view of *Warren v. Palmer* establishes a division of function between the respective reorganization courts on the one hand, and among them and the Commission on the other, which recognizes the public interest, and protects the individual constitutional rights of New Haven creditors involved.

For example, in the instant case, the division of functions among the two courts and the Commission would be as follows: The New Haven Reorganization Court should adjudicate, as it already has, matters as to which the Commission has no jurisdiction, i.e., questions of legal rights between parties. In the instant case that adjudication involved the determination that the New Haven creditors were constitutionally entitled to be equitably secured in their right to payment for the assets taken from them, free

from the lien of their mortgages, because of the public interest in continued rail operation. Based upon that adjudication, the Commission, and not the reorganization court, would then decide the valuation questions, capitalization, if pertinent, and related matters. After determination by the Commission in this instance of a plan of reorganization for the New Haven under Section 77 which fairly and equitably treated with those questions, it would certify the same to the New Haven Reorganization Court for the normal course of review under Section 77.

Since, however, in the instant case, the plan of reorganization for the New Haven would involve payment by another railroad also in reorganization under Section 77, the Penn Central Reorganization Court would in due course pass upon the treatment of the New Haven estate's claim (whose amount and form would have already been established by the Commission and the New Haven Reorganization Court) as part of the reorganization plan for Penn Central certified to it by the Commission. In such latter review, the New Haven's established claim would be subject to the impact, as determined by the Commission and the Penn Central Reorganization Court, of the Penn Central reorganization plan on claims of the same rank, priority, and security.

The only qualification on these divisions of functions would be that, as in *Warren v. Palmer, supra*, if the New Haven's established claims took a form which actually interfered with *the operations* of Penn Central, the Penn Central Reorganization Court would have *exclusive jurisdiction*, to determine, the extent of the same, and the protection required in the public interest against the interference. As previously indicated, the New Haven Reorganization Court was wholly sensitive to the exclusive jurisdiction of the Penn Central Reorganization Court to control both Penn Central operations and the ultimate treatment in a reorganization plan for Penn Central of a New Haven claim protected by

a limited equitable lien and constructive trust. While the Court of Appeals assumed that these security devices adversely affected the operations of Penn Central, there was no showing that any such impact has occurred or could occur. And, in fact, none has.

The only certain and intended effect of the judgment of the New Haven Reorganization Court is that the New Haven's claim to be paid for the property which it conveyed to Penn Central pursuant to Commission and court order, and before final adjudication of the price and terms, would, as limited to that property, have priority over other non-administration secured claims and the claims of general creditors of Penn Central. Where the security provided is limited wholly to the property and rights conveyed, not only is the mere existence of such security interest demonstrably not injurious to the conduct of Penn Central's operation in reorganization, but it is equitably justified. Only a person having a claim which arose subsequent to December 31, 1968 in specific reliance upon the New Haven's lack of an equitable security interest in the former New Haven assets could claim otherwise; but such a contention could not equitably be sustained in view of the continued existence, from a date even preceding the conveyance, of the litigation with respect to the amount and terms of payment for the property.

Without this Court's determination of the applicability to the instant case of *Warren v. Palmer*, the confusion that must result as to the future proceedings in the New Haven reorganization has the seeds of further confusion compounded in other Section 77 proceedings now in process in

reorganization courts in the first and third circuits.[16]

4. The Court of Appeals Ouster of The New Haven Reorganization Court From its Substantive Jurisdiction is Unprecedented; and Will Unduly Prolong The New Haven Reorganization Proceedings.

The public interest, the interest of investors, and national transportation policy require that reorganization plans under Section 77 be formulated and consummated with the greatest possible speed. At best, much time is consumed. The Court of Appeals cited with approval, however, the Commission's stated intention to "consolidate the Penn Central reorganization and New Haven inclusion proceedings so as to consider the terms of the New Haven inclusion as 'a portion of the reorganization of Penn Central . . . ' " (A-19), and remanded the case to the Commission for this purpose. In thus ousting the New Haven Reorganization Court from jurisdiction over the New Haven reorganization after more than ten years, and subjecting New Haven creditors to a new reorganization of indefinite but lengthy duration, the Court of Appeals would protract the New Haven reorganization proceedings to a seemingly endless pro-

[16] The Court of Appeals seeks to avoid jurisdictional conflicts by assigning related reorganizations to the same court. However, substantial and difficult §77(a) jurisdictional problems arise when the same court supervises two related reorganizations as well as when two different courts must delineate their respective jurisdictions over the same *res*. For example, in the case of the Lehigh Valley Railroad Company, Debtor, whose separate reorganization proceedings are supervised by the same court which supervises the Penn Central reorganization, it appears that Penn Central is not presently being paid regular interline operating balances by Lehigh Valley (see *Lehigh Valley Railroad Company Abandonment Between Dushore and Towanda, Pa.* 338 I.C.C. 793, 797 (1972). Thus, creditors of Penn Central, as well as creditors of Lehigh Valley, have to face the question of the capacity in which the same Section 77 reorganization court will determine how respective creditors of a bankrupt parent and its bankrupt subsidiary are to be protected in their respective operations.

cess.[17] Consolidation of the two proceedings clearly would eliminate any possibility of a completion of the New Haven proceedings prior to completion of the Penn Central reorganization and, in fact, may even have the effect of postponing a New Haven reorganization under such circumstances until after completion of the Penn Central reorganization.

The stated objective of the Court of Appeals' decision is to vest in another district court the precise issue that this Court held in an analogous context would be best adjudicated in the New Haven Reorganization Court:

> "We therefore hold that the three-judge court here should have granted the Government's motion to the extent of deferring to the reorganization court in proceedings ultimately involving only the price to be paid for the assets of the debtor's estate." *New Haven Inclusion Cases*, 399 U.S. at 430.

The New Haven Reorganization Court's knowledge and expertise in this matter, which has been pending before it for more than ten years, are unmatchable in expediting the termination of the New Haven reorganization proceedings. It is the only court with a complete record before it of New Haven participation in proceedings which have been involved in various appellate aspects in this Court on three prior occasions.[18] If the New Haven proceedings were to become

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[17] On April 3, 1972, the Penn Central Trustees reported to the Penn Central Reorganization Court that they would not file a plan for reorganization of Penn Central prior to April 1973, and that their present studies are based upon operating conditions estimated to exist in 1976. The proceedings before the Commission leading to approval and certification of a plan to the district court under these circumstances and the latter's subsequent approval and confirmation proceedings may reasonably be assumed to require many years to complete.

[18] *New Haven Inclusion Cases, supra; Penn Central Merger and N & W Inclusion Cases*, 389 U.S. 486 (1968); *Baltimore & Ohio R.R. v. United States*, 386 U.S. 372 (1967).

subject to review in the Penn Central Reorganization Court, as directed by the Court of Appeals, the evidence of the past ten years would be required in large measure again to be prepared, offered and considered *de novo*. This procedure would produce further adverse consequences to the objective of efficient, economical administration of the bankruptcy laws, already sorely tried in a number of cases, without any concomitant legal or public gain. Such a result in itself warrants the review of, and promulgation of guiding principles by, this Court concerning the questions presented.

Affirmance of the New Haven Reorganization Court's appropriate jurisdiction in the premises as to New Haven matters other than those affecting the operations of the Penn Central system would appear to make possible the formulation and carrying out of a plan of reorganization for the New Haven which need not wait upon the completion of the reorganization of Penn Central. To be sure, the actual receipt by the New Haven of payment for its properties conveyed to Penn Central could be years in the future and would, in any event, depend on the treatment for secured creditors of the New Haven's rank, priority, and security, as ultimately approved by the Penn Central Reorganization Court in a plan for Penn Central.[19] However, once the pending question as to the form and characteristics of the New Haven claim has finally been resolved, e.g., whether and how and in what amount the claim is deemed equitably secured, the final determination by the Commission of a plan for equitable treatment of the creditors' claims in the New Haven's own reorganization and the approval of such plan by the New Haven Reorganization Court may be achieved with a minimum of delay.

[19] As this Court pointed out at the beginning of its opinion in the *New Haven Inclusion Cases*, in noting the institution of the Penn Central's reorganization proceedings: "Whether the financial obligations dealt with in the present opinion may become subject to modification in or because of those proceedings is a question with which the present opinion in no way deals," 399 U.S. at 399 n.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted in order for this Court to review the jurisdictional judgment of the Court of Appeals and the substantive merits of the equitable lien and constructive trust adjudicated by the New Haven Reorganization Court.

Respectfully submitted,

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Dated: April 28, 1972

APPENDIX

STATUTES INVOLVED

Section 77. Reorganization of Railroads Engaged in Interstate Commerce. — (a) Any railroad corporation may file a petition stating that it is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of reorganization. The petition shall be filed with the court in whose territorial jurisdiction the corporation, during the preceding six months or the greater portion thereof, has had its principal executive or operating office, and a copy of the petition shall at the same time be filed with the Interstate Commerce Commission (hereinafter called the "Commission"). When any railroad, although engaged in interstate commerce, lies wholly within one State, the proceedings shall be brought in the United States district court for the district in which its principal operating office has been located during the preceding six months or the greater portion thereof. The petition shall be accompanied by payment to the clerk of a filing fee of $150. Upon the filing of such a petition, the judge shall enter an order either approving it as properly filed under this section, if satisfied that it complies with this section and has been filed in good faith, or dismissing it, if he is not so satisfied. If the petition is so approved, the court in which the order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a court of the United States would have had if it had appointed a receiver in equity of the property of the debtor for any purpose. Process of the court shall extend to and be valid when served in any judicial district. The Supreme Court of the United States shall promulgate rules relating to the service of process outside of the district in which the proceeding is pending, and any other rules which it may deem advisable in order to aid district

courts and courts of appeal in exercising the jurisdiction herein conferred upon them. The railroad corporation shall be referred to in the proceedings as a "debtor." Any railroad corporation the majority of the capital stock of which having power to vote for the electioon of directors is owned, either directly or indirectly through an intervening medium, by any railroad corporation filing a petition as a debtor may file, with the court in which the other debtor has filed such a petition, and in the same proceeding, a petition, a copy of which shall also be filed at the same time with the Commission, stating that it is insolvent or unable to meet its debts as they mature, and that it desires to effect a reorganization in connection with, or as a part of the plan of reorganization of the other debtor; and upon the filing of the petition, the judge shall enter an order either approving it as properly filed under this section, if satisfied that it complies with this section and has been filed in good faith, or dismissing it if not so satisfied, and thereupon the court, if it approves the petition, shall have the same jurisdiction with respect to such debtor, its property and its creditors and stockholders, as the court has with respect to the other debtor. Creditors of any railroad corporation, having claims aggregating not less than 5 per centum of all the indebtedness of the corporation as shown in the latest annual report which it has filed with the Commission at the time when the petition is filed, may, if the corporation has not filed a petition under this section, file with the court in which the corporation might file a petition under this section, a petition stating that the corporation is insolvent or unable to meet its debts as they mature and that the creditors have claims aggregating not less than 5 per centum of all such indebtedness of the corporation and propose that it shall effect a reorganization; copies of the petition shall be filed at the same time with the Commission and served upon the corporation. The corporation shall, within ten days after such service, answer the petition. If the

answer admits the jurisdiction of the court and the material allegations of the petition, the judge shall enter an order approving the petition as properly filed if satisfied that it complies with this section and has been filed in good faith, or dismissing it, if not so satisfied. If the answer denies either the jurisdiction of the court or any material allegation of the petition, the judge shall summarily determine the issues presented by the pleadings without the intervention of a jury, and if he finds that the material allegations are sustained by the proofs and that the petition complies with this section and has been filed in good faith, the judge shall enter an order approving the petition; otherwise, he shall dismiss the petition. If such a petition is so approved, the proceedings thereon shall continue with like effect as if the railroad corporation had itself filed a petition under this section. If a petition is dismissed, neither the petition nor the aswer of a debtor constitute an act of bankruptcy or an admission of insolvency or of inability to meet maturing obligations or be admissible in evidence, without the debtor's consent, in any proceedings then or thereafter pending or commenced under this Act or in any State or United States court. If, in any case in which the issues have not already been tried under the provisions of this subdivision, any of the creditors, prior to the hearing provided for in paragraph (1) of subsection (c) of this section, appear and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, and, unless the material allegations of the petition are sustained by the proofs, shall dismiss the petition.

Section 77(c) Reorganization of Railroads Engaged in Interstate Commerce.

(6) If a lease of a line of railroad is rejected, and if the lessee, with the approval of the judge, shall elect no longer to operate the leased line, it shall be the duty of the

lessor at the end of a period to be fixed by the judge to begin the operation of such line, unless the judge, upon the petition of the lessor, shall decree after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the said line, in which event it shall be the duty of the lessee to continue operation on or for the account of the lessor until the abandonment of such line is authorized in accordance with the provisions of section 1 of the Interstate Commerce Act as amended, or until such operation pursuant to this paragraph is otherwise lawfully terminated. During any such operation, the lessor shall be deemed to be a carrier subject to all applicable provisions of the Interstate Commerce Act, as amended, and shall be entitled to receive just, reasonable, and equitable divisions of rates, fares, or charges applicable to the transportation of persons or property over its line or lines of railroad and the lines of the lessee or other carriers, and the provisions of section 15(6) of the Interstate Commerce Act, as now or hereafter amended, shall apply to said divisions whether or not joint rates covering such transportation have been established.

United States Court of Appeals

For the Second Circuit

Nos. 372, 373, 374 — September Term 1971.
(Argued January 3, 1972 Decided March 17, 1972.)
Docket Nos. 71-1903, 71-1929, 71-2024

In the Matter of
THE NEW YORK, NEW HAVEN AND
HARTFORD RAILROAD COMPANY,

Debtor.

Before:

LUMBARD, HAYS and MANSFIELD,

Circuit Judges.

HAYS, *Circuit Judge:*

This is an appeal from an order of the United States District Court for the District of Connecticut declaring an equitable lien on certain property and imposing a constructive trust on income from certain other property transferred by the debtor New York, New Haven and Hartford Railroad (New Haven) to the Penn Central Transportation Company (Penn Central). We reverse on the ground that the district court lacked subject matter jurisdiction under §77(a) of the Bankruptcy Act, 11 U.S.C. §205(a) (1970), to issue the order, since the property affected is within the exclusive jurisdiction of another district court.

This appeal involves one more stage in the lengthy and complicated proceedings involving the reorganization of the New Haven, the merger of the Pennsylvania Railroad

and the New York Central Railroad to form the Penn Central, the inclusion of the New Haven's lines in the merged Penn Central, and Penn Central's subsequent petition for reorganization. An outline of the various proceedings from 1961 to 1969 is set forth in *New Haven Inclusion Cases*, 399 U.S. 392, 399-418 (1970). See also *Penn-Central Merger and N & W Inclusion Cases*, 389 U.S. 486 (1968) and *Baltimore & Ohio R.R.* v. *United States*, 386 U.S. 372 (1967). For purposes of this appeal, a brief outline of the previous proceedings will suffice.

In July, 1961, New Haven filed a petition for reorganization pursuant to §77 of the Bankruptcy Act, 11 U.S.C. §205 (1970), in the United States District Court for the District of Connecticut. The court approved the petition and appointed trustees. In March, 1962 the Pennsylvania and New York Central railroads applied to the Interstate Commerce Commission for permission to merge. In June, 1962 the New Haven trustees filed with the Commission a petition for inclusion in the proposed merged railroad. The Commission has never proposed a reorganization plan for the New Haven itself. In 1966 the Commission approved the merger of the Pennsylvania and New York Central but required as a condition of approval of the merger that the New Haven's lines be included in the merged railway system. The New Haven trustees and representatives of the Pennsylvania and New York Central railroads thereupon entered into a Purchase Agreement, subsequently modified, which provided that all the New Haven assets would be transferred to Penn Central in return for cash, and stock and bonds of Penn Central. The New Haven trustees requested the Connecticut reorganization court to permit them to petition the Commission to require inclusion of the New Haven's lines in the merged rail system on the terms set forth in the Purchase Agreement. The Connecticut reorganization court granted permission, and in 1967 the

Commission approved inclusion on the terms provided in the Purchase Agreement. Subsequent litigation dealt with the proper value to be assigned to the New Haven properties. On December 24, 1968, however, because of the precarious financial condition of the New Haven and the imminent termination of its rail service, the Connecticut reorganization court approved the transfer of New Haven's assets to Penn Central, leaving the exact amount and form of consideration to be paid by Penn Central to be settled finally at a later date. Since the Commission conditioned approval of the merger on inclusion of the New Haven, Penn Central, as a result of the merger, consented to be bound by "whatever terms the [Connecticut] reorganization court might [later] confirm . . ." *New Haven Inclusion Cases*, supra at 428. However the transfer of New Haven's assets was expressly made "free and clear of all liens, charges and encumbrances."

The decision of the Supreme Court in *New Haven Inclusion Cases*, handed down on June 29, 1970, upheld the determination of the Connecticut reorganization court that the value of the New Haven property transferred to Penn Central was approximately $174.6 million. Under the Purchase Agreement, an object of which was to assure that the New Haven estate would actually receive full compensation, a portion of the consideration was to be paid to the New Haven estate in the form of Penn Central stock and bonds. Because of mounting financial pressures, however, the market value of Penn Central stock declined drastically from the date of the first negotiations between New Haven and Penn Central representatives and the final inclusion of the New Haven in the merger. See *In re New York, N.H. & H. R.R.*, 304 F. Supp. 793, 808-810 (D. Conn. 1969); *New York, N.H. & H. R.R. Co. First Mortgage 4% Bondholders' Committee* v. *United States*, 305 F. Supp. 1049, 1064-65 (S.D.N.Y. 1969). See also *Pennsylvania Railroad Co.—Merger—New York Central Railroad Co. (Fifth*

Supplemental Report), 334 I.C.C. 528, 532 (1969). The Supreme Court, therefore, while agreeing with the Connecticut reorganization court's valuation, remanded the case for "[f]urther proceedings before the Commission and the appropriate federal courts . . . to determine the form that Penn Central's consideration to New Haven should properly take . . ." *New Haven Inclusion Cases*, supra at 489.

On June 21, eight days before the Supreme Court's decision was announced, Penn Central filed a petition for reorganization in the Eastern District of Pennsylvania. The petition was approved the same day and the district court issued an order restraining and enjoining all persons "from interfering with, seizing, converting, appropriating, attaching, garnisheeing, levying upon, or enforcing liens upon, or in any manner whatsoever disturbing any portion of the assets . . . properties or premises belonging to, or in the possession of the Debtor [Penn Central] . . . and from commencing or continuing any proceeding against the Debtor" with certain exceptions not here relevant.

After receiving the mandate of the Supreme Court, the Connecticut reorganization court did not remand to the Commission for further proceedings. Instead, it ordered, on August 10, 1970, that a hearing be held on the question of whether the court should modify its prior orders with respect to the New Haven assets previously transferred to Penn Central. The Penn Central trustees appointed by the Pennsylvania reorganization court appeared at the hearing, although they were not parties to the New Haven reorganization. After various proceedings extending over approximately ten months, the Connecticut reorganization court issued a decision on June 11, 1971. The court first held, on various grounds, that it had subject matter jurisdiction. Because the decline in the market price of Penn Central stock and Penn Central's pending reorganization had rendered the court's plan for compensation for the New

Haven property grossly inequitable, the court declared that, in order to implement the Supreme Court's mandate to compensate fully "the New Haven estate for the balance [of the purchase price] remaining due and to provide reasonable security for the sum owed,"

> "(1) . . . the 956,576 shares of common stock of the Penn Central Company, the parent company, should be treated as collateral security, of indeterminate value, for the balance of the purchase price due by the Penn Central Trustees; it is wholly unrealistic to treat the stock otherwise; (2) that an equitable lien must be declared on all of the former assets transferred by the New Haven to Penn Central, exclusive of (a) rolling stock and (b) the New Haven's one-half interest in the excess income from the Grand Central [Terminal] properties; and (3) that the Penn Central Trustees hold the latter item of property subject to a constructive trust in favor of the New Haven estate."

The reasoning of the district court was that, as the Supreme Court had determined that the New Haven estate had the constitutional right to receive $174.6 million for the assets transferred to the Penn Central, the New Haven estate could not be relegated to the position of a general creditor in the pending Penn Central reorganization.

On June 21, 1971 the Pennsylvania reorganization court issued an order directing the Penn Central trustees to appear before the Connecticut reorganization court and to object to the entry of any order based on that court's decision of June 11, on the ground that the Connecticut reorganization court had no jurisdiction to issue an order of the nature indicated by the decision of June 11. The order of the Pennsylvania reorganization court enjoined any person "from taking any action which would enforce, collect or cause to be perfected or paid any claim against the Debtor or its estate arising out of the inclusion of the New

Haven into the Debtor, other than in these proceedings, or which would interfere with the primary jurisdiction of this Court to deal with properties in its possession or under its control pending further order of this court." In contravention of the constructive trust declared, but not yet ordered, by the Connecticut reorganization court, the Pennsylvania court directed the Penn Central trustees to use all the income from the Grand Central Terminal properties to pay Penn Central's current expenses. Despite this action, the Connecticut reorganization court entered its order on June 22 and appointed counsel to perfect the interest of the New Haven estate in the property. An appeal of the order of the Connecticut district court was thereupon taken to this court.

I. The Issues

The issue presented by this appeal is whether the Connecticut district court had jurisdiction to declare an equitable lien on the property transferred by New Haven to Penn Central and a constructive trust on that portion of the income from the Grand Central Terminal properties that, prior to the transfer, New Haven had the right to receive.

Section 77(a) of the Bankruptcy Act, 11 U.S.C. §205(a) (1970), provides in relevant part:

> "If the petition [stating that the railroad is insolvent and wishes to reorganize its capital structure] is so approved [by a judge of the district court of proper venue], the court in which the order is entered shall, during the pendency of the proceedings under the section and for the purposes thereof, have *exclusive jurisdiction of the debtor and its property wherever located.* . . ." (Emphasis added).

In the present case we are faced with conflicting claims of subject matter jurisdiction over certain property by two

district courts sitting as reorganization courts in proceedings involving two debtor railroads. The property over which both courts claim jurisdiction is the property formerly comprising the assets of the New Haven that the New Haven was required to transfer to Penn Central before the receipt of compensation for it. The Connecticut reorganization court approved the transfer of all these properties to Penn Central in return for consideration in an amount and form to be determined in further proceedings.

The appellants argue that the Connecticut reorganization court had no jurisdiction to declare an equitable lien and a constructive trust on property and income formerly belonging to the New Haven. They maintain that, since the property was transferred to Penn Central almost three years before the issuance of the order that is the subject of this appeal, the Pennsylvania district court had exclusive jurisdiction under §77(a) to determine all rights and interests in all of Penn Central's property, including the former property of the New Haven.

The appellees advance four bases of jurisdiction upon which the Connecticut district court could premise its order of June 22. First, they say, the "exclusive jurisdiction" provision of §77(a) cannot be read literally, and the district court's action comports with the policy underlying that section. Second, the Connecticut reorganization court had jurisdiction to implement the Supreme Court's mandate in the *New Haven Inclusion Cases*. Third, the Connecticut reorganization court reserved jurisdiction, in its order authorizing the transfer of the New Haven estate's assets, over the property so transferred. Finally, the Connecticut reorganization court had *in personam* jurisdiction over the Penn Central trustees and thus had the power to adjudicate the rights of the parties in property not located within the court's territorial jurisdiction.

II. Section 77(a) Jurisdiction

The problem here presented concerns the conflict of jurisdiction between two federal courts each claiming jurisdiction to affect interests in certain property over which, under a literal reading of §77(a), one federal court has "exclusive jurisdiction." Although conflicting claims of jurisdiction under §77(a) are not uncommon, the usual type of conflict is between a state court and a federal court, in which the state court's action would in some way interfere with the federal court's administration or actual reorganization of the debtor railroad. See *Gardner* v. *New Jersey*, 329 U.S. 565 (1947); *Thompson* v. *Texas Mexican Ry.*, 328 U.S. 134 (1946); *Board of Dirs. of St. Francis Levee Dist.* v. *Kurn*, 98 F.2d 394 (8th Cir. 1938). Cf. *Palmer* v. *Massachusetts*, 308 U.S. 79 (1939). Situations involving that type of conflict involve factors arising from the federal-state relationship that are not present in the instant case. See *Callaway* v. *Benton*, 336 U.S. 132 (1949); *Meyer* v. *Fleming*, 327 U.S. 161 (1946); *Thompson* v. *Magnolia Petroleum Co.*, 309 U.S. 478 (1940); *In re New York, N.H. & H. R.R.*, 109 F.2d 136 (2d Cir. 1940). Cf. 28 U.S.C. §1334 (1970).

The Congressional purpose behind the enactment of §77 in general and the "exclusive jurisdiction" provision of §77(a) in particular was to eliminate the need for ancillary receivership proceedings in federal courts in every state in which the railroad operated its lines. See Rodgers & Groom, *Reorganization of Railroad Corporations Under Section 77 of the Bankruptcy Act*, 33 Colum.L.Rev. 571 (1933); Craven & Fuller, *The 1935 Amendments of the Railroad Bankruptcy Law*, 49 Harv. L. Rev. 1254 (1936). The overlapping jurisdiction of numerous courts was not conducive to the speedy and efficient reorganization of a financially unsound railroad. See Fuller, *The Background and Techniques of Equity and Bankruptcy Railroad Reorganizations*—A Survey, 7 Law & Contemp Probs 377 (1940);

Laughlin, *The Extraterritorial Powers of Receivers*, 45 Harv. L. Rev. 429 (1932); Morehouse, *Receiverships*, 7 Yale L.J. 299 (1898). By eliminating the need for ancillary receivership proceedings and providing for "exclusive jurisdiction" in one federal court with nationwide service of process, see §77(a); *Continental Ill. Nat'l Bank & Trust Co.* v. *Chicago, R.I. & Pac. Ry.*, 294 U.S. 648 (1935), Congress intended to vest subject matter jurisdiction over the debtor railroad and its property in one federal court which would have adsolute power over that property and over the administration of the roalroad pending the submission of a reorganization plan by the Interstate Commerce Commission and approval of such a plan by the court. See *Ecker* v. *Western Pac. RR.*, 318 U.S. 448, 466-74 (1943). Cf. *Palmer* v. *Massachusetts*, supra at 88-89 and n. 15.

The Supreme Court's decision in *Warren* v. *Palmer*, 310 U.S. 132 (1940) is determinative of this case. The *Palmer* case involved the conflict between two federal district courts sitting as reorganized courts pursuant to §77(a), with each claiming subject matter jurisdiction over the same property. The Boston & Providence Railroad leased one of its lines to the Old Colony Railroad, and Old Colony then leased the line to the New York, New Haven and Hartford Railroad. The New Haven, experiencing financial difficulties, filed a petition for reorganization which was approved by the district court for the District of Connecticut. After various proceedings, the court ordered the New Haven trustees to reject the B & P lease pursuant to §77(c)(6) and to operate the line for the account of B & P. Shortly thereafter the B & P filed a petition for reorganization which was approved by the district court for the District of Massachusetts. As the line operated by the New Haven trustees for the account of B & P was incurring losses, the New Haven trustees requested and the Connecticut district court granted a lien on the B & P property in the

amount of the loss. The Supreme Court upheld the jurisdiction of the Connecticut court to declare a lien which would be binding on the Massachusetts district court. The Supreme Court said:

> "The property of the Boston and Providence came into the *possession* of the trustees of the New Haven and the Old Colony and remained there during the entire time covered by the claim. These roads were lessees of the property and debtors under §77 in the Connecticut court. It is immaterial what title the debtors had, whether a lease or a fee. The physical property covered by the lease was in the custody of the Connecticut court by virtue of the provisions of §77(a) . . . .
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> . . . .
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> . . . In view of the public importance of rail service, we think this subsetion [§77(c)(6)] represents an intention to give the court *charged with operation* the fullest ability to secure the necessities of operation—an intention to give the operating court power to promise those having the materials, men and equipment needed for operation a first lien on the road to secure payment for the operation."

310 U.S. at 138-40 (footnotes omitted; emphasis added). See also *Thompson* v. *Magnolia Petroleum Co.*, supra, at 481-82. The Supreme Court had earlier stated in *Ex parte Baldwin*, 291 U.S. 610, 615-16 (1934):

> "All property in the possession of a bankrupt of which he claims the ownership passes, upon the filing of a petition in bankruptcy, into the custody of the court in bankruptcy . . . . The jurisdiction in such cases is exclusive of the jurisdiction of other courts, although otherwise the controversy would be cognizable in them . . . .

> . . . But the exclusive jurisdiction acquired by the bankruptcy court through taking possession of the interurban railway under claim of title, was not limited to the prevention of interference with the use of the land . . . . The jurisdiction extends also to the adjudication of questions respecting the title."

To accept appellees' argument that the "exclusive jurisdiction" provision of §77(a) in this context does not in fact mean "exclusive"

> "would tend greatly to foment conflicts between coordinate courts and compel creditors, in the protection of their interests, to ride the circuit, demonstrating the basis of their positions in successive courts. Surely such a state of affairs would not constitute the intended improvement over the practice in equity receiverships, wherein the task of ascertaining charges and assessing liens had been consolidated . . . in the court of primary jurisdiction."

In re New York, N.H. & H. R.R., 26 F. Supp. 18, 23 (D. Conn.), aff'd sub nom. *Palmer* v. *Warren*, 108 F.2d 164 (2d Cir. 1939), aff'd, 310 U.S. 132 (1940), quoted with approval in *New Haven Inclusion Cases, supra*, 399 U.S. at 427. See also *New England Coal & Coke Co.* v. *Rutland R.R.*, 143 F.2d 179, 184 (2d Cir. 1944), quoted with approval in *New Haven Inclusion Cases, supra*, 399 U.S. at 426. The position of the commentators is that, in a situation such as this, "exclusive jurisdiction" is given and should be given its literal meaning. See Mussman and Riesenfeld, *Jurisdiction in Bankruptcy*, 13 Law & Contemp. Probs. 88, 97-99 (1948); Rodgers & Groom, supra at 607-08 and n. 207; Weiner, *Reorganization Under Section 77: A Comment*, 33 Colum. L. Rev. 834, 846-48 (1933); 5 Collier, *Bankruptcy* §77.11 (14th Ed. 1970).

We hold, therefore, that because Penn Central had legal title to and actual possession of the former assets of

New Haven when its petition was approved; because Penn Central was, and the trustees are, using those assets and the income therefrom to operate its lines and the former lines of the New Haven; because the order of the Connecticut district court could, at this stage of the Penn Central reorganization proceedings, seriously impair the formulation of a workable plan for the financial resuscitation of Penn Central by the Commission and the ability of the Pennsylvania reorganization court to administer the entire Penn Central system, of which the New Haven line is but a division, see, *e.g.*, §77(o), 11 U.S.C. §205(o) (1970), only the Pennsylvania reorganization court had subject matter jurisdiction under §77(a) over the property here in question.

III. The Supreme Court's Mandate in the *New Haven Inclusion Cases*

Appellees maintain that the Connecticut reorganization court had jurisdiction to declare the equitable lien and constructive trust, in order to provide that the New Haven would receive "reasonable assurance" of full payment for the assets transferred to Penn Central, under the terms of the mandate of the Supreme Court in the *New Haven Inclusion Cases.*

Penn Central's petition for reorganization was appoved eight days before the Supreme Court's decision in *New Haven Inclusion Cases.* The Supreme Court said at the beginning of its opinion:

> "On June 21, 1970, the Penn Central Transportation Company filed a petition for reorganization . . . in the United States District Court for the Eastern District of Pennsylvania. Whether the financial obligations dealt with in the present opinion may become subject to modification in or because of those proceedings is a question with which the present opinion in no way deals."

New Haven Inclusion Cases, supra at 399 n.+. The Court set aside the order of the Connecticut district court and remanded for "[f]urther proceedings before the Commission and the *appropriate federal courts* . . . to determine the form that Penn Central's consideration to New Haven should properly take and the status of the New Haven estate as a shareholder or creditor of Penn Central." Id. at 489 (emphasis added).

In view of the language accompanying the remand, we do not interpret the mandate as conferring jurisdiction on the Connecticut reorganization court, particularly when as we have demonstrated, the interpretations of and policy underlying §77(a) clearly require the opposite result.

IV. Retention of Jurisdiction and *In Personam* Jurisdiction

Appellees would have us hold that the Connecticut district court, in its order transferring the New Haven's assets to Penn Central and ordering inclusion, retained "jurisdiction to act on any question respecting claims between the two railroads." However the order cannot be properly interpreted as either encompassing this type of equitable action or, indeed, any action based on events occurring subsequent to the transfer order. See *Towers Hotel Corp.* v. *Lafayette Nat'l Bank*, 148 F.2d 145 (2d Cir. 1945).

Even assuming that the reservation of jurisdiction could be construed as encompassing the type of action involved here, once the property came within the "exclusive jurisdiction" of the Pennsylvania reorganization court by virtue of that court's approval of Penn Central's petition for reorganization, the policy of §77(a) would prevent acceptance of appellees' contention. Due consideration of the congressional purpose in granting "exclusive jurisdiction" over the debtor's property to the reorganization court,

would preclude permitting another district court to exercise jurisdiction on the ground that such jurisdiction was reserved in a related proceeding when the effect of the exercise of retained jurisdiction would be to hinder the ability of the reorganization court to administer the property of the railroad pending reorganization. Thus, even if the Connecticut reorganization court's order were construed to include the reservation of jurisdiction to declare an equitable lien and a constructive trust, the subsequent approval of Penn Central's petition by the Pennsylvania reorganization court served to oust the Connecticut court's jurisdiction and to vest "exclusive jurisdiction" in the Pennsylvania court.

Appellees' final contention, that the Connecticut reorganization court had jurisdiction to declare the lien and constructive trust because it had *in personam* jurisdiction over the Penn Central trustees, is without merit. Even if the Connecticut court had *in personam* jurisdiction, it lacked subject matter jurisdiction; the Pennsylvania reorganization court had "exclusive jurisdiction" over the subject matter—the former property of New Haven— and only that court was competent to take action with respect to that property.

V. Remand

This case must be remanded to the Commission so that a reorganization plan, fair and equitable to all parties, can be formulated. One of the main reasons for the enactment of §77 was to establish a reorganization procedure in which an expert agency would examine the technical and financial problems of the railroad and propose a reorganization plan to the reorganization court for approval. As both the Penn Central and the New Haven are in reorganization, at least nominally, before courts in different circuits, the Commission is the common denominator between those

courts so far as the formulation of a single plan, or two interrelated plans, is concerned. Whatever protection the New Haven estate must receive in terms of some senior position in the Penn Central proceeding must first be proposed by the Commission in the context of a reorganization plan for the Penn Central which, it is to be hoped, will advance the public interest by successfully establishing a financially viable Penn Central. The Commission has stated that, if the proceeding is remanded to it, it will consolidate the Penn Central reorganization and New Haven inclusion proceedings so as to consider the terms of the New Haven inclusion as "a portion of the reorganization of Penn Central . . ." This procedure is, we believe, the proper method by which the interests of all parties—the New Haven estate, Penn Central and its creditors, and the public—can best be advanced.

We do not imply by this remand that we disagree either with the fairness of Judge Anderson's order or with his conclusion that the Supreme Court's opinion in *New Haven Inclusion Cases* requires that the New Haven estate receive $174.6 million as compensation for the taking of its property. We hold only that the Connecticut reorganization court is not the proper body to grant whatever protection is required because it has no jurisdiction, and we remand the case to the Interstate Commerce Commission with directions to consider, in light of the Penn Central reorganization, the form of consideration the New Haven estate should receive.

Reversed and remanded to the Interstate Commerce Commission.

MANSFIELD, *Circuit Judge* (Concurring and Dissenting):

I concur in the majority opinion to the extent that it remands the case to the Interstate Commerce Commission with directions, in the light of the Penn Central reorganiza-

tion, to consider the form of the consideration which the New Haven estate is to receive. However, I dissent from the view that the Connecticut reorganization court lacks jurisdiction to review the fairness and equity of the consideration to be paid by the Penn Central to the New Haven estate. In my view the unusual factual and legal background of this dispute suggests that the Connecticut and Pennsylvania reorganization courts have concurrent jurisdiction over the subject matter.

I agree with the majority that once the Penn Central Railroad was placed in reorganization pursuant to §77 of the Bankruptcy Act the Pennsylvania court was vested by §77(a) with exclusive jurisdiction over its properties, including those that had been transferred to it by the New Haven pursuant to the Connecticut court's authorization. Thereafter the Connecticut court was barred from taking any action which might have the effect of interfering with the Pennsylvania court's operation of the railroad in reorganization under its jurisdiction. Although the creation of a lien and a constructive trust upon assets of the Penn Central might not have the immediate effect of disrupting that court's operation of the railroad, such action could pose the threat of doing so. For example, if the Pennsylvania court wished to raise money for operation of the railroad by further mortgaging its properties, it might be frustrated unless it had the power to disregard or set aside the lien and trust declared by the Connecticut court.

Although the Connecticut court may not take any action which would have the effect of interfering with the Pennsylvania court's operation of the railroad, I do not agree that the Commission and the Pennsylvania court have the power, unilaterally and without approval of the Connecticut court, to determine the form of the consideration that is to be paid to the New Haven estate and its creditors for the assets transferred to the Penn Central. The Connecticut court continues to function as a §77 reorganization

court and has been vested by the Supreme Court with the powers of a reviewing court under §5 of the Interstate Commerce Act. 399 U.S. at 430. As such it has a vital interest in the final determination of the terms and conditions of the New Haven's inclusion in the Penn Central. Indeed the Supreme Court, after careful review, accepted the Connecticut court's formulation of those terms. It remanded only because the "impact of recent events," which I construe to mean the Penn Central's bankruptcy (expressly referred to by the Court at page 399 n. †), had rendered unrealistic the provisions for the Penn Central's underwriting, at $87.50 per share, of the stock to be transferred by it to the New Haven pursuant to the plan, thereby depriving the New Haven and its creditors of the purchase price to which they were constitutionally entitled.

The reorganization of the New Haven Railroad and its merger into the Penn Central will not have been completed until the fairness and equity of the terms and conditions of the transfer of its assets to the Penn Central, including the form of the consideration that is to be received, have finally been determined. The Connecticut court continues to have the power and the duty as a reviewing court under §5 of the Interstate Commerce Act and as a reorganization court under §77 of the Bankruptcy Act, to participate in that determination. If the New Haven estate had become in effect a mere subsidiary or ward of the Pennsylvania court for reorganization purposes, the Supreme Court, which knew that the Penn Central was in reorganization and which was aware of the provision of §77(a) giving "exclusive jurisdiction" to a reorganization court over properties in its possession, see 399 U.S. at 420, would have held that the form of the consideration to be paid by the Penn Central must thereafter be determined by the Pennsylvania court as part of the reorganization of the Penn Central, and it would have directed that upon remand the Connecticut court must transfer the case to the Commis-

tion, to consider the form of the consideration which the New Haven estate is to receive. However, I dissent from the view that the Connecticut reorganization court lacks jurisdiction to review the fairness and equity of the consideration to be paid by the Penn Central to the New Haven estate. In my view the unusual factual and legal background of this dispute suggests that the Connecticut and Pennsylvania reorganization courts have concurrent jurisdiction over the subject matter.

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Although the Connecticut court may not take any action which would have the effect of interfering with the Pennsylvania court's operation of the railroad, I do not agree that the Commission and the Pennsylvania court have the power, unilaterally and without approval of the Connecticut court, to determine the form of the consideration that is to be paid to the New Haven estate and its creditors for the assets transferred to the Penn Central. The Connecticut court continues to function as a §77 reorganization

court and has been vested by the Supreme Court with the powers of a reviewing court under §5 of the Interstate Commerce Act. 399 U.S. at 430. As such it has a vital interest in the final determination of the terms and conditions of the New Haven's inclusion in the Penn Central. Indeed the Supreme Court, after careful review, accepted the Connecticut court's formulation of those terms. It remanded only because the "impact of recent events," which I construe to mean the Penn Central's bankruptcy (expressly referred to by the Court at page 399 n. †), had rendered unrealistic the provisions for the Penn Central's underwriting, at $87.50 per share, of the stock to be transferred by it to the New Haven pursuant to the plan, thereby depriving the New Haven and its creditors of the purchase price to which they were constitutionally entitled.

The reorganization of the New Haven Railroad and its merger into the Penn Central will not have been completed until the fairness and equity of the terms and conditions of the transfer of its assets to the Penn Central, including the form of the consideration that is to be received, have finally been determined. The Connecticut court continues to have the power and the duty as a reviewing court under §5 of the Interstate Commerce Act and as a reorganization court under §77 of the Bankruptcy Act, to participate in that determination. If the New Haven estate had become in effect a mere subsidiary or ward of the Pennsylvania court for reorganization purposes, the Supreme Court, which knew that the Penn Central was in reorganization and which was aware of the provision of §77(a) giving "exclusive jurisdiction" to a reorganization court over properties in its possession, see 399 U.S. at 420, would have held that the form of the consideration to be paid by the Penn Central must thereafter be determined by the Pennsylvania court as part of the reorganization of the Penn Central, and it would have directed that upon remand the Connecticut court must transfer the case to the Commis-

sion and the Pennsylvania court. Instead it remanded the case to the Connecticut court, stating:

> "Further proceedings before the Commission and the appropriate federal courts will be necessary to determine the form that Penn Central's consideration to New Haven should properly take and the status of the New Haven estate as a shareholder or creditor of Penn Central." 399 U.S. at 489.

The Supreme Court's remand of the case to the Connecticut court without further qualifications, coupled with the use of the plural term "courts," confirms the view that the Connecticut court was not to be stripped of its powers as a reviewing court.

I further disagree with the majority's view that *Warren* v. *Palmer*, 310 U.S 132 (1940), "is determinative of this case" or that it has the effect of precluding the Connecticut court from having a voice in the fairness and equity of the consideration to be received by the New Haven and its creditors from the Penn Central. Although that decision did involve a question of competing jurisdiction between two §77 reorganization courts, it turned on a provision of the Bankruptcy Act not applicable here, §77(c)(6), which specifically requires a reorganization court that has rejected a leased line to operate it if the lessor is incapable of doing so, in which case continued operation is for the account of the lessor. The Supreme Court interpreted that section as giving "the court charged with operation the fullest ability to secure the necessities of operation," 310 U.S. at 140. In short the Supreme Court understandably decided that a reorganization court operating a leased line must have the power to impose a lien for deficits resulting from its being compelled to operate the line for the benefit of the lessor. The decision hardly precludes the existence of concurrent jurisdiction in an appropriate case.

Thus it appears to me that this case, which is *sui generis*, involves dual or concurrent jurisdiction with respect to

the fairness and equity of the consideration to be paid by the Penn Central in reorganization to the New Haven. While the Pennsylvania court has exclusive jurisdiction over the operation of the Penn Central, including the New Haven Division, the fairness of the consideration to be paid to the New Haven, including the form of that consideration and the status of the New Haven as a creditor in the Penn Central reorganization, as initially formulated by the Commission as the common denominator, is subject to approval by both courts.

That there is nothing novel or unusual about the existence of concurrent jurisdiction in railroad reorganization proceedings is demonstrated by the Supreme Court's recognition at an earlier stage in these proceedings that the Connecticut court, as a §77 reorganization court, and the three-judge district court sitting in the Southern District of New York as a reviewing court under §5 of the Interstate Commerce Act, each had jurisdiction to review the fairness and reasonableness of the terms for inclusion of the New Haven in the Penn Central. See 399 U.S. at 419-30. There the Supreme Court concluded, for reasons set forth in detail, that the three-judge court should have deferred to the Connecticut court. Although there is always the danger that exercise of overlapping or concurrent jurisdiction by two courts may lead to conflict or wasteful duplication of effort, this seems to me to be an instance where "two heads are better than one." An important reason for holding that the Connecticut court should not defer here, which the Supreme Court implicitly recognized in the *New Haven Inclusion Cases*, is that over the years of the New Haven's reorganization the Connecticut court has become intimately familiar with the complicated factual and legal issues arising out of the New Haven's reorganization, thereby gaining a manifest expertise in the valuation of its assets. While I have no doubt about the competence of the highly respected Pennsylvania court to review the matter, it seems to me that in a matter of such importance both courts, working co-

operatively and with the aid of the Commisson, can function effectively to produce a result that will assure all parties a greater degree of fairness and equity than might otherwise be realized.

Thus none of the conditions mandating that one court defer to the other seems to exist here. The issue cannot be resolved in favor of the Pennsylvania court on the ground that it first acquired jurisdiction through possession of the New Haven properties (the basis used by the Supreme Court in the *New Haven Inclusion Cases*). The Connecticut court was the first to acquire possession as a reorganization court and it continued thereafter in possession for years, participating in the formulation of the inclusion terms that were approved by the Supreme Court. Nor can it be said that the Connecticut court, by transferring the New Haven properties to the Penn Central, implicitly agreed to defer to the Pennsylvania court. On the contrary, the Connecticut court, in ordering the transfer of the New Haven property to the Penn Central, expressly reserved jurisdiction to pass upon the fairness and adequacy of the consideration and the other terms of inclusion of the New Haven in the Penn Central. Unlike the circumstances surrounding the concurrent jurisdiction of the Connecticut court and the three-judge district court in the Southern District of New York, nothing in the background of the present jurisdictional overlap suggests that either forum here is better equipped for the task than the other. Nor is there any reason to believe that both courts would not cooperate in their review of the terms formulated by the Commission, eventually reaching an agreement. If they should disagree, however, I have no doubt that upon ultimate review of the Penn Central reorganization plan, including the form of consideration to be paid to the New Haven estate, the Supreme Court would appreciate having the recorded views of the Connecticut court, which has become a respected veteran in this protracted and complicated matter.

In the Matter of the NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor.
No. 30226.

UNITED STATES DISTRICT COURT,
D. CONNECTICUT.
JUNE 11, 1971.

MEMORANDUM OF DECISION ON ISSUE OF EQUITABLE LIEN AND OTHER MATTERS PRELIMINARY TO REMAND TO INTERSTATE COMMERCE COMMISSION

ANDERSON, Circuit Judge.*

This is an unusual case, and the features which make it so stem from the basic circumstances that the New Haven Railroad, a deficit operation for several years prior to and throughout the seven years of operation in reorganization, was kept going in the public interest; that it was compelled, again in the public interest, to transfer its properties and assets to Penn Central Transportation Company (Penn Central),[1] receiving in return, at the time, only a small

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* Sitting by designation.

[1] As used in this opinion the term "Penn Central" means the Penn Central Transportation Company, a railroad, which since June 21, 1970, has been in railroad reorganization in the United States District Court for the Eastern District of Pennsylvania.

Prior to October 1, 1969, the corporate name of the Debtor was Penn Central Company. The term "Penn Central Company" presently refers to a Pennsylvania corporation which holds all of the stock of the operating railroad which is the Penn Central Transportation Company. While the New Haven Trustee originally received stock of the railroad Penn Central Company at the time of the New Haven's inclusion on December 31, 1968, the stock which he presently holds is stock of the parent Penn Central Company that he received in exchange for the stock of the present Debtor, the Penn Central Transportation Company, pursuant to its plan of corporate reorganization which was approved by its stockholders and made effective on October 1, 1969.

fraction of the true and actual value of the New Haven's properties and assets while it awaited a value determination by the Supreme Court; and that the Penn Central itself went into bankruptcy shortly before the Supreme Court's decision. Although the case is unique, the controlling principles are those of simple justice.

Penn Central filed its petition for reorganization in the Eastern District of Pennsylvania on June 21, 1970. Eight days later, on June 29, 1970 the Supreme Court decided the New Haven Inclusion Cases, 399 U.S. 392, 90 S.Ct. 2054, 26 L.Ed.2d 691. On July 31, 1970 the Supreme Court's judgment was filed in the New Haven reorganization court, which, on August 10, 1970, directed the Trustee of the New Haven and any other parties desiring to be heard to file written statements of position, particularly as to six designated subjects hereinafter referred to as paragraphs A, B, C, D, E and F,[2] to be considered by the court in connection with the form of order to be issued in carrying out the terms of the Supreme Court decision.

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[2] Those six subjects are:

A. Whether and, if so, to what extent, this court should modify its prior orders with respect to Step II of the plan of reorganization for the New Haven heretofore approved by the Interstate Commerce Commission and this court, as a result of said opinion of the Supreme Court.

B. Whether this court should indicate to the Interstate Commerce Commission specific views or recommendations with respect to the proceedings to be conducted by the Interstate Commerce Commission in its further proceedings in the premises, and, if so, what such views or recommendations should be.

C. Whether this court may order an equitable lien on or otherwise subject the assets conveyed to the present Penn Central Transportation Company on December 31, 1968 by the then Trustees of the New Haven to a first security interest in favor of the New Haven and, if so, whether such an order should be entered and what its terms should be in conformity with said opinion of the Supreme Court.

D. Whether this court may order the trustee of the indenture securing the Divisional First Mortgage Bonds issued by the present

Statements of position and briefs were filed by the principal parties and the case is ready for remand by this court to the Interstate Commerce Commission (I.C.C.). Meanwhile many constructive steps have been taken and much has been accomplished in resolving the problems implicit in these subjects through negotiation by representatives of the Penn Central and New Haven estates, and through action taken by the Penn Central reorganization court, over which Judge John P. Fullam presides. Similarly in the case of the Boston and Providence Railroad Corporation (B & P), there were the additional collaboration of the representatives of the B & P estate and the necessary action by the B & P reorganization court, over which Judge Francis J. W. Ford presides. Thus as to ¶ F, the B & P

Penn Central Transportation Company to the then Trustees of New Haven, in part consideration for the assets of the New Haven conveyed on December 31, 1968, or order the Trustees of Penn Central Transportation Company, to pay over or cause to be paid over to the Trustee of the New Haven all proceeds from the sale of mortgaged property now on deposit with such indenture trustee, all future proceeds remaining to be paid with respect to sales of mortgaged property heretofore made, and all proceeds of mortgaged property hereafter sold, leased or otherwise divested by the Trustees of Penn Central Transportation Company and, if so, whether such an order should be entered and what its terms should be in conformity with said opinion of the Supreme Court.

E. Whether this court may order the Trustees of Penn Central Transportation Company to pay over to the Trustee of the New Haven, periodically as may be determined pending resolution by the Interstate Commerce Commission and judicial review of the issues remanded by the Supreme Court, of an amount equal to half the excess income from the Grand Central Terminal properties and, if so, whether such an order should be entered and what its terms should be in conformity with said opinion of the Supreme Court.

F. Whether this court may order the Trustees of Penn Central Transportation Company and the Trustee of the New Haven to carry out as soon as possible the plan of reorganization of the Boston and Providence Railroad Corporation and, if so, whether such an order should be entered and what its terms should be in conformity with said opinion of the Supreme Court.

reorganization has been fully consummated, and a railroad reorganization instituted in 1938 has thereby been concluded.

As to ¶ D, again through negotiation and this time with the approval of the Penn Central reorganization court and this court, the Penn Central Trustees and the New Haven Trustee divided equally some $18 million received from the sale of assets which the New Haven had conveyed to Penn Central on December 31, 1968. While the subject of future drawdowns by the New Haven estate of the proceeds from sales and leases of former New Haven property warrants continued consideration, the matters within ¶ D may at this time be dismissed without prejudice. The subjects of paragraphs A, B, C and E remain for consideration.

JURISDICTION

At the threshold, the Trustees of the Penn Central challenge the jurisdiction of this court to make a declaration as to the foregoing subjects and the issues they involve. This court, however, has long had jurisdiction over the person of Penn Central, both under its present and former name, as a party to this action. See 399 U.S. at 428, n. 57, 90 S.Ct. 2054. At the time of the conveyance of New Haven's assets to Penn Central on December 31, 1968 the court expressly reserved jurisdiction over subject matters relating to the payment of the price, including the form of payment. The Penn Central has appeared and actively participated in all of the proceedings before this court concerning the transfer of assets and payment for them from December 19, 1968 forward, including the period from the time when Penn Central petitioned in reorganization to the present.

This court has the exclusive jurisdiction to determine the effect of the Supreme Court's mandate in the *New Haven Inclusion Cases*, and this court must decide what is to be done to implement it. The full price required

to be paid for the New Haven's assets was decided, but the terms of the payment were not; and this court alone must review and determine what means, pursuant to the Supreme Court's mandate, are proper. The I.C.C. cannot adjudicate the issues of law now before this court, for these lie outside its jurisdiction. The Commission itself has so held in principle in the Boston & Providence Railroad Reorganization Proceedings, 290 I.C.C. 363, 382 (1954), 327 I.C.C. 10, 15 (1966), and, again, in the very proceeding before this court the Commission stated:

> "It is not within our jurisdiction to fix New Haven's legal rights, if any, in the Grand Central Terminal properties." Pennsylvania Railroad Company — Merger — New York Central Railroad Company, 331 I.C.C. 643, 680 (1967).

This court, with the aid of a special master appointed by it, adjudged those rights.

So here, the Commission has no jurisdiction to decide the legal questions of the New Haven's status, whether as that of a stockholder or creditor, including the type of creditor, and the further related question as to whether or not the New Haven estate has a full security interest in its former properties for the balance of the purchase price. These are legal questions which are for this court's determination in construing the Supreme Court's mandate. In the circumstances of this case ordinary sense and logic call for a resolution of these paramount issues before remand of the case to the I.C.C. in order that it may proceed with prior knowledge of how the legal questions have been adjudicated.

The Penn Central Trustees point to §77(a) where it says the reorganization court "* * * shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor

and its property wherever located * * *," and argue that all jurisdiction is in the Penn Central reorganization court and only that court can impose or declare a lien or determine any other questions affecting the New Haven properties transferred to Penn Central on December 31, 1968. Of course, the language of §77(a) literally gives the New Haven reorganization court exclusive jurisdiction over all legal or equitable interests which the New Haven has in any property, even though it may be in the possession of the Penn Central. The Penn Central's Trustees' argument ignores the fact that the New Haven reorganization court not only reserved jurisdiction over the matter of payment for the assets transferred to Penn Central by the inclusion order itself, but it has a mandate from the Supreme Court to deal further with questions relating to the determination of the rights and obligations of the parties with regard to the form of payment for the property of the New Haven transferred to the Penn Central. It would be odd, indeed, if by the same decision, this court were barred, for example, from determining whether or not in the circumstances an equitable lien should be declared which would relate back to December 31, 1968, the date of the transfer, because meanwhile the transferee, over whom this court has long had jurisdiction with respect to the terms of the transfer, filed for §77 reorganization itself in the Eastern District of Pennsylvania. It should clearly be borne in mind, however, that this court claims only the power to declare the existence of an equitable lien on the conveyed property, including a constructive trust to the extent of the capitalized value of one-half of the excess income from the Grand Central properties, for the balance due on the purchase price. With the property in the possession of the Trustees of the Penn Central and with the duties of operation resting on that company's Trustees, the New Haven reorganization court does not under present circumstances assert the power to enforce such a lien. The declaration of a lien

will have no adverse impact on the ability of the Penn Central to operate as a railroad, and the Penn Central reorganization court will remain wholly in control of the effect, if any, of such a lien on the operations of the railroad and on its reorganization plan formulation.

The fact that the adjudication which the court is now making does not interfere with Penn Central operations or plan formulation distinguishes this case from Gardner v. New Jersey, 329 U.S. 565, 67 S.Ct. 467, 91 L.Ed. 504 (1947), where New Jersey was attempting to pull out chunks of the railroad from the reorganization court's jurisdiction; and from Warren v. Palmer, 310 U.S. 132, 60 S.Ct. 865, 84 L.Ed. 1118 (1940), where the Supreme Court relied on § 77(c) (6) and the principle against interference with operations to sustain the jurisdiction of the New Haven reorganization court. *Warren* v. *Palmer* clearly illustrates that the "exclusive jurisdiction" clause cannot literally be relied on. In that case the B & P was under the "exclusive jurisdiction" of the reorganization court in Boston. The New Haven and the Old Colony Railroads were under the "exclusive jurisdiction" of the United States District Court at New Haven. The Old Colony Trustees and the New Haven Trustees rejected the B & P lease; the New Haven was ordered to operate the formerly leased lines for the account of the B & P; and the question was whether the New Haven reorganization court could adjudge a lien for operations on the B & P property. Here there were two reorganization courts, each with "exclusive jurisdiction" over the debtor and its property wherever located. Reading § 77(a) literally, the B & P reorganization court in Boston, with "exclusive jurisdiction" over the B & P, had exclusive jurisdiction over the B & P lines because the lease had been rejected and the B & P was owner. Yet the Supreme Court sustained the "exclusive jurisdiction" of the New Haven reorganization court to declare a lien on the B & P property. The Supreme

Court sustained that exercise of power by reference to § 77(c) (6), which deals with the rejection of leases and operations of leased lines, and emphasized that the jurisdiction of the New Haven reorganization court was being sustained because the matter dealt with operations.

The B & P affords another illustration of how the statutory provision for "exclusive jurisdiction" accommodates to practical situations. As pointed out *supra*, three reorganization courts, each with "exclusive jurisdiction" adjudged matters within its peculiar jurisdiction to effect the consummation of the B & P reorganization.

The "exclusive jurisdiction" clause in § 77(a) was designed to eliminate the need for ancillary receivership proceedings; to give one court, the reorganization court, power to preserve the railroad as a unit and as a going concern, and, with the aid of the I.C.C., to approve a plan of reorganization. Accordingly, suits may be brought against the reorganization trustees on claims arising out of rail operations in any court of competent jurisdiction; and, even though the reorganization court has summary jurisdiction, it must, in an appropriate situation, permit an adjudication of the matter to be made in another court. Thompson v. Magnolia Petroleum Company, 309 U.S. 478, 60 S.Ct. 628, 84 L.Ed. 876 (1940).

That the "exclusive jurisdiction" clause must always be read in light of its background is further made evident in relation to accounts receivable held by a railroad in reorganization. Penn Central, for example, has millions of dollars of accounts receivable. A purely literal reading of the "exclusive jurisdiction" clause would suggest that such collection proceedings would have to be conducted before the reorganization court. However, it is elementary that the Penn Central reorganization court does not have jurisdiction, over the objection of an account debtor, of proceedings

to collect these accounts receivable. In re Standard Gas & Electric Co., (Hastings v. H. M. Byllesby & Co.) 119 F.2d 658 (3 Cir. 1941); 2 Collier on Bankruptcy (14th ed.) ¶ 23.05 [4]. Plenary suits for this purpose must be brought in courts of competent jurisdiction and would not come before the reorganization court.

That language in this area of bankruptcy cannot be applied with orthological exactitude is further demonstrated by 28 U.S.C. § 1334. This section provides:

> "The district courts shall have original jurisdiction, exclusive of the courts of the States, of all matters and proceedings in bankruptcy."

Yet it is accepted practice that hundreds of actions involving bankruptcy matters can and are brought in the state courts. 1 Moore's Federal Practice (2d ed.) ¶ 0.–60 [8.–6]. Indeed, at times, they must be brought in a state court. Thompson v. Magnolia Petroleum Company, *supra*.

This Court's jurisdiction is supported by other principles, such as the line of cases holding that a court which has *in personam* jurisdiction can nevertheless determine rights with respect to property in the *in rem* jurisdiction of another court, Barrett v. International Underwriters, Inc., 346 F.2d 345 (7 Cir. 1965); Dempsey v. Pink, 92 F.2d 572 (2 Cir. 1937), cert. denied 303 U.S. 648, 58 S.Ct. 745, 82 L.Ed. 1109 (1938); 1A Moore's Federal Practice (2d ed.) ¶ 0.222; and also by cases which, while recognizing that state courts have exclusive jurisdiction over probate matters, hold that the federal courts nevertheless have jurisdiction over *inter partes* suits, otherwise within federal jurisdiction, that do not usurp jurisdiction of a probate nature. 1 Moore's Federal Practice (2d ed.) ¶ 0.60 [1], p. 604.

Moreover, there are compelling practical reasons why this court should resolve the issues now before it. In addi-

tion to the Supreme Court's mandate, this court has had the advantage of a decade of dealing with the complex factual circumstances which have attended the New Haven's reorganization, with the clashing claims made by multiple contending parties and the continuing duty to protect the New Haven estate. It is the only district court that has had to hear and rule upon every aspect of the case from its beginning to the inception of the present issues. For reasons analogous to those which prompted the Supreme Court to recognize this reorganization court as having preferred jurisdiction over the three-judge court in New York to determine the price to be paid for the property transferred to Penn Central, this court has like jurisdiction to hear and decide the issues now before it.

Outline of Events Leading to Inclusion Cases in Supreme Court and Construction of Mandate.

A brief résumé of the pertinent events leading up to the Supreme Court's hearing of the *New Haven Inclusion Cases* is essential to an understanding of the rationale of its decision and to a sense of what is called for in implementing it.

After the New Haven had been in reorganization and had carried on its deficit operation for seven years during which its assets had been depleted by 60 to 70 million dollars in the public interest, this court decided that it could not allow the interests of the New Haven bondholders to be further eroded after the end of 1968 because the constitutional prohibition against the taking of private property without just compensation forbade it. At the same time the court continued to be acutely aware of the crucial importance of the railroad to the economy of southern New England and the public interest in preserving its operation. Accordingly, because the Pennsylvania and New York Central

Railroads had voluntarily agreed — in a contract that became irrevocable upon their merger on February 1, 1968 — to include the New Haven as a condition of their merger, the Interstate Commerce Commission and this court ordered the merged Penn Central physically to take over the properties and operations of the New Haven by the end of 1968. The inclusion took place on December 31, 1968. At the time of the transfer the Penn Central paid, exclusive of the 956,576 shares of Penn Central stock, about $63 million on account of the indebtedness ultimately found due by the Supreme Court and which, as a part of its own merger, Penn Central had agreed to pay. Penn Central and all other parties knew on December 31, 1968 that the total value of the consideration Penn Central was to pay remained for future determination by the federal courts.

Two federal district courts had been concurrently exercising jurisdiction and were principally concerned with the issue of fair and equitable price which Penn Central should pay for the assets of the New Haven. A three-judge district court for the Southern District of New York, exercising jurisdiction under § 5 of the Interstate Commerce Act, had on July 10, 1968 enjoined the order of the I.C.C. originally fixing the price to be paid by Penn Central for the New Haven's assets at $125,000,000. This reorganization court, exercising jurisdiction under § 77 of the Bankruptcy Act, on August 13, 1968 similarly rejected that price.[3] Subsequently, the I.C.C. in its Fourth Supplemental Report fixed the purchase cost to Penn Central at $140,600,000, plus $5 million for a share of the New Haven's operation losses in 1968, for an aggregate total of $145,600,00. In reviewing this valuation, this reorganization court held that the I.C.C. legally erred as to six items for an undervaluation of $29,-

[3] As the Supreme Court noted in the New Haven Inclusion Cases, the three-judge court estimated the $125 million figure was an understatement on the order of $45 million to $50 million, and the reorganization court, $33 million to $55 million. 399 U.S. at 414-415, 90 S.Ct. 2054.

035,899.[4] Accordingly, it fixed the total cost to Penn Central at $174,635,899. The three-judge district court, on the other hand, found an undervaluation of only $990,000. Penn Central acquiesced in this finding and paid this additional amount to New Haven.[5] The price differential between this reorganization court and the three-judge district court was in the neighborhood of $28 million.

The other side of the problem was whether the consideration which Penn Central had paid New Haven was equal to the credit given Penn Central. The real controversy swirled around the value attributable to the 956,576 shares of common stock of the Penn Central Company. This reorganization court, mindful of its duty to see that all are treated fairly, on its own initiative, formulated underwriting provisions designed to assure that the New Haven would obtain a per share value of $87.50; and, as underwritten, approved the per share value of $87.50. The three-judge court adopted the same underwriting provisions and the $87.50 figure.

As the cases reached the Supreme Court, Penn Central had been credited in round figures as follows: $33.3 million

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[4] The reorganization court held that the Commission had legally erred as to the following items (the first five increased the price, the sixth reduced it):

$15,386,000	one year abandonment delay
6,695,000	bulk sale discount
4,439,000	Bronx Yards
1,600,000	improper deduction for tax obligations
2,415,899	excess discount to present value
— 1,500,000	CCBI's
$29,035,899	

[5] It did this on November 11, 1969. The "mix" of the consideration paid was:

$370,260	bonds
565,290	stock
54,450	cash
$990,000	

for assumption of certain obligations of New Haven, cancellation of certificates issued by the Trustees of the New Haven, and cash payments; approximately $29.6 million for the $34,025,800 principal amount of 5% Divisional First Mortgage bonds of Penn Central that liened the former New Haven rail properties; and $83.7 million, the value assigned to the common stock.

The Supreme Court (1) held that although the three-judge court initially had jurisdiction concerning the merger, it should have stayed its hand in determining the price to be paid by Penn Central and the value of the consideration Penn Central had transferred to the New Haven, since this reorganization court was the preferred court to determine those matters; (2) affirmed this court in all respects as to price; and (3) stated that at the time of this court's decision, it had correctly decided as to the value of the common stock, in the light of this court's proposed underwriting, but that because of recent events, i. e. Penn Central's bankruptcy, "The reorganization court's decree may be wholly unrealistic," as indeed is now is, and that "a reassessment of the consideration that Penn Central is to give in exchange for" the New Haven's assets is required.

The Supreme Court's decision clearly requires a realistic assessment—not a formal one, for if only the latter had been in the Court's mind, the Court would have affirmed in toto. Nothing would have remained to be done except to determine how the additional price should be paid.

It was clearly the intent of this court, the parties, and the Commission that the New Haven estate would be fully compensated. The Constitution requires as much. This court formulated the underwriting provisions for the stock with the belief that these would make the New Haven whole as to the value attributed to the stock, but Penn Central's

bankruptcy has made all the provisions concerning the stock "wholly unrealistic."[6]

"The fairness and equity that are the essence of a §77 proceeding," the Supreme Court stated, "forbid our approval of a payment for the transferred New Haven properties that may be worth only a fraction of its purported value." 399 U.S. at 488, 90 S.Ct. at 2108.

Continuing, the Court said:

> "* * * In the circumstances of this case, and for the reasons we have already set out at length, we agree with the reorganization court that it would be unfair and inequitable to allow Penn Central to take the properties for any lesser sum [liquidation value]. Moreover, we today require a reassessment of the consideration that Penn Central is to give in exchange for those properties. We thereby accord the bondholders the right to a liquidation and a per-parcel sale that is theirs by virtue of their mortgage liens. * *" 399 U.S. at 489-490, 90 S.Ct. at 2108.
>
> And "* * * we must also reject any lingering suggestion by Penn Central that the price it must pay for the New Haven assets is unfair in either a statutory or a constitutional sense. * *" 399 U.S. at 493, 90 S.Ct. at 2110.

Accordingly, the Supreme Court's mandate obligates the Trustees of Penn Central to see that the New Haven estate is fully compensated for the remaining balance due the New Haven in the amount of $132 million plus, with interest.

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[6] Cautiously, the Supreme Court said: "may be wholly unrealistic." 399 U.S. at 488, 90 S.Ct. 2054.

While such cautionary language was proper at a time only 8 days after Penn Central's bankruptcy, the intervening year strips away the "may be" qualification and makes clear that the stock arrangement is "wholly unrealistic."

The Supreme Court, at 489, 90 S.Ct. at 2108, stated that

> "* * * further proceedings before the Commission and the appropriate federal courts will be necessary to determine the form that Penn Central's consideration to New Haven should properly take and the status of the New Haven estate as a shareholder or creditor of Penn Central."

It also, at page 399, 90 S.Ct. at page 2061, noted the petition of the Penn Central for reorganization under § 77 and stated:

> "Whether the financial obligations dealt with in the present opinion may become subject to modification in or because of those proceedings is a question with which the present opinion in no way deals."

It is this court's position that the nature and form (including whether or not it should be treated as secured) of the indebtedness of Penn Central to the New Haven for the assets transferred, long before Penn Central went into reorganization, and at a time when both the New Haven, as debtor, and Penn Central were solely under the jurisdiction of this court, are matters within the exclusive jurisdiction of this court. Both the New Haven and Penn Central reorganization courts have the duty and jurisdiction to protect the New Haven's constitutional right not to have the equity imposed security of the transferred properties further confiscated in the public interest. The Penn Central reorganization court has exclusive jurisdiction over any action by the New Haven Trustee to enforce his equitable lien and also over the form of the consideration and its time and manner of payment as they may be affected by a fair and equitable plan of reorganization of the Penn Central.

This position is consonent with the Supreme Court's statements above quoted.

Implementation of the Supreme Court's Mandate.

(Including discussion of ¶ C, note 2, supra)

In order fully to compensate the New Haven estate for the balance remaining due and to provide reasonable security for the sum owed, it is the opinion of this court that the Supreme Court's mandate must be implemented by providing: (1) that the 956,576 shares of common stock of the Penn Central Company, the parent Company, should be treated as collateral security, of indeterminate value, for the balance of the purchase price due by the Penn Central Trustees; it is wholly unrealistic to treat the stock otherwise; (2) that an equitable lien must be declared on all of the former assets transferred by the New Haven to Penn Central, exclusive of (a) rolling stock and (b) the New Haven's one-half interest in the excess income from the Grand Central properties; and (3) that the Penn Central Trustees hold the latter item of property subject to a constructive trust in favor of the New Haven estate.

The above mentionad equitable lien is not a consensual lien nor is it an involuntary equitable lien arising out of a judicial proceeding, such as that which emanates from a creditor's bill to reach and apply equitable assets which are beyond the grasp of legal process. See Freedman's Savings & Trust Co. v. Earle, 110 U.S. 710, 4 S.Ct. 226, 28 L.Ed. 301 (1884). The lien here invoked is the kind which the chancellor creates to do equity under the peculiar circumstances of the case, and, in particular, by the bankruptcy chancellor to implement a just reorganization under § 77 of the Bankruptcy Act.

The Trustee's brief sets forth a reasonably good description of this type of equitable lien as follows:

"An equitable lien has been defined as a right, not existing at law, to have specific property applied in whole or in part to the payment of a particular debt. Thus, there must be a debt or obligation and a *res* to which the debt can attach. The doctrine is a remedy for a debt, based upon traditional equitable theories of estoppel and unjust enrichment. An equitable lien may be imposed where one party, by a course of conduct, has raised the expectation in the other party that an obligation will be secured, or where one party takes a conveyance or assignment of the property of another and retains the property without paying for it. Morrison Flying Service v. Deming National Bank, 404, F.2d 856 (10th Cir. 1968), cert. den. 393 U.S. 1020 [89 S.Ct. 628, 21 L.Ed.2d 565] (1969); Reconstruction Finance Corp. v. Sun Lumber Company, 126 F.2d 731 (4th Cir. 1942); Westall v. Wood, 212 Mass. 540 [99 N.E. 325] (1912)."

The Tenth Circuit also stated the matter well:

"An equitable lien is a creature of equity, is based on the equitable doctrine of unjust enrichment, and is the right to have a fund or specific property applied to the payment of a particular debt. Such a lien may be declared by a court of equity out of general considerations of right and justice as applied to the relationship of the parties." (Footnotes omitted.) Caldwell v. Armstrong, 342 F.2d 485, 490 (10 Cir. 1965).

In the first place it was expected and intended by the parties that full payment would be made to the New Haven Trustees for the property, assets and rights which they conveyed to the Penn Central. The I.C.C. ordered Penn Central to pay a price less than the fair liquidation value of the property; and it was not until June 29, 1970 that the full purchase price was determined by the Supreme Court's decision. Meanwhile the Penn Central Transportation Com-

pany went into reorganization. Its Trustees now assert that the New Haven Trustee has at best no more than a general claim in bankruptcy for the balance of the purchase price. This ignores the whole history of the New Haven inclusion, the general terms and framework of which stem from the contract of April 21, 1966, made between the New Haven Trustees and the Pennsylvania and New York Central Railroads. 399 U.S. 409–413, 90 S.Ct. 2054. This contemplated a simultaneous payment of the purchase price at the time of the transfer of the New Haven's assets to the merged Penn Central. As the Supreme Court said, 399 U.S. at 410, n. 45, 90 S.Ct. at 2067:

> "The transfer was to be free and clear of all liens and encumbrances, with minor exceptions. The liens and encumbrances would shift to the proceeds of the sale and thus remain an obligation of the New Haven estate."

This concept followed through, to and including the actual transfer. Except for some high priority claims, the real parties to whom the proceeds of the sale and transfer belong are the New Haven bondholders. They had secured claims before the transfer of the assets to the Penn Central on December 31, 1968 and the parties had agreed and intended that the New Haven bondholders would have a secured claim after the transfer of assets by having a lien on the proceeds. The reason the New Haven bondholders do not in law have such security is because the Penn Central Transportation Company has not paid the full proceeds to which the bondholders' lien can shift and attach. In equity, therefore, their lien on the property, which was the subject of the transfer, did not "shift to the proceeds of the sale" but remains on the property transferred.

The Penn Central Trustees argue that any such claim is foreclosed by the order and deed of transfer which said the property was conveyed "free and clear of all liens,

charges and encumbrances thereon." This covenant, customarily incorporated in the overwhelming majority of transfers in the ownership of the fee of real property and frequently incorporated in instruments of conveyance at bankruptcy sales, may render a transfer free of such liens as a consensual lien or a judicial lien arising out of a creditor's bill, but it does not constitute a waiver of the chancellor's equitable lien or a bar to his power to create one. If this customary clause were to constitute a waiver of the chancellor's equitable lien, the bankruptcy chancellor would be shorn of his power to protect the estate in any situation where the covenant or clause "free and clear" was used and there could be no such thing as an equitable lien in that sense. The clause cannot be used either in law or equity to insulate a grantee who has failed to pay the purchase price from having the property subject to an equitable lien in favor of the grantor. The parties were fully cognizant of the fact that the total purchase price had not been determined, that it would not be fixed for several months, but that whatever the Supreme Court said it was, the Penn Central had a duty to pay it. By the time the price had been determined Penn Central had maneuvered itself into a financial debacle and had filed a petition for reorganization under § 77.

The fact that the New Haven was compelled in the public interest to convey its properties to the Penn Central without simultaneously receiving the full purchase price did not constitute a waiver of a lien which at that time could not be determined. A party can only waive a known right and it must do so intentionally. Neither fact existed here. The right to additional payment of purchase price on which a matured lien would depend was not then adjudicated. The New Haven had, at the time of the transfer, an inchoate lien with which the property was impressed. It could only become a matured lien through the act or default of the grantee, itself, the Penn Central. This is accomplished by

failure to pay the price fixed by the Supreme Court. In the circumstances of the case, this is not the kind of lien referred to by the "free and clear of all liens * *" clause in the deed of conveyance which was intended only to cover liens and encumbrances imposed by act of the grantor or third persons and not those caused by the act of the grantee itself. The matured equitable lien relates back to the date of the transfer, which was the date the inchoate lien arose which the act of the Penn Central itself brought to fruition.

Its Trustees take the position that the New Haven Trustee and the New Haven bondholders, as beneficial owners, have no equitable claim at all; that the New Haven Trustees made an agreement of sale, got a down payment, including shares in Penn Central, which they said they wanted, and conveyed the property of the New Haven to the Penn Central. Though there is still due and unpaid on the purchase price agreed to be paid over $132,000,000, the Penn Central Trustes say the New Haven is only a common creditor, at best, except for the divisional mortgage. They argue that no security for this purchase price should be afforded the New Haven estate because the old New Haven assets might have to be expended in the public interest to pay for the Penn Central's operational losses and further, if anything were left, the New Haven property should be used to secure the Penn Central's other creditors, presumably its other bondholders. For example, Manufacturers Hanover Trust Co., Indenture Trustee under N. Y. Central & Hudson River R. R. Co. Gold Bond Mortgage of 1897, claims that the New Haven property comes within the provisions of its mortgage. The Penn Central Trustees do not contradict this.

Thus one sees the New Haven's properties and assets, which on December 31, 1968 furnished some security for the New Haven bondholders, who had contributed substantially to their acquisition, transferred to Penn Central,

which, after paying only a small fraction of the price in actual money's worth before going into reorganization, now through its Trustees contemplates using the property to make up for its own operational losses or to furnish additional security for its bondholders and other creditors. Certainly these are circumstances that cry out for equitable relief.

The Penn Central Trustees are actually seeking an unjust enrichment. These putative beneficiaries never gave any consideration for the acquisition of these properties by the New Haven and they have no equity in them which is the equivalent of or superior to that of the New Haven bondholders.

Considerable emphasis must be given to the fact that the issue of an equitable lien in favor of the New Haven estate on the property transferred to Penn Central on December 31, 1968, affects *only* the interests of the two parties, i.e. the New Haven and the Penn Central. Interests of third parties, innocent or otherwise, are not involved, because no creditor entered into a credit transaction with the Trustees of Penn Central in reliance upon Penn Central's ownership of the New Haven property unencumbered by an equitable lien.[7] While the State of Connecticut appears to make such a claim, its interest is in seeing that no equitable lien will impair the agreement between the Connecticut Transportation Authority and Penn Central Transportation Company, and it is abundantly clear that the equitable lien claimed by the New Haven would not do so. As a result of the negotiated settlement between the Trustee of the New Haven and the Trustees of the Penn Central, relating to the Penn Central's acquisition of the B & P and reflected in the

[7] The declaration of an equitable lien in the present case is not intended to affect, nor should it be construed to affect, former properties of the New Haven transferred to Penn Central and which were conveyed as non-operating properties by Penn Central to third persons between January 1, 1969 and the date of the filing of this memorandum of decision.

petition for and in this court's order Number 634, dated February 16, 1971, the declaration by this court of an equitable lien on former properties of the New Haven will not apply to the former properties of the B & P. See also Order Number 636, dated March 22, 1971.

Although the Penn Central's Trustees strongly imply the contrary, the deficit ridden New Haven Railroad was not foisted upon Penn Central; rather the Pennsylvania and N. Y. Central Railroads voluntarily agreed to purchase and operate it as a condition to their right to merge. They knew the New Haven was a deficit operation and had been for over a decade. They knew the New Haven would continue to be so, at least for some years to come. The suggestion that Penn Central's own financial difficulty was brought on "to some extent" by losses of the New Haven, coupled with the intimation that this creates a kind of equitable claim by Penn Central which off-sets a claim by the New Haven is untenable.

The condition of the New Haven Railroad was known to the world. It appears that the true condition of the Penn Central may not have been. If either party was misled to its damage in the inclusion transaction, it was not the Penn Central. It seems likely at present that the true financial condition and position of the Penn Central at the time of its acceptance of the transfer of the New Haven's properties, was not, and had not been fully disclosed to the Interstate Commerce Commission, the federal courts or the Trustees of the New Haven or its bondholders.

The Trustees of the Penn Central concede in their brief that if there had been fraud involved on the part of Penn Central in taking over the New Haven properties, there would be ground for the imposition of an equitable lien. Fraud was not alleged in the statements of position now before this court, and is not being considered as a part of the record of the case. The court, however, is aware of Con-

gressional and I.C.C. reports and other materials which suggest that an inquiry may be needed to determine whether or not the officers and directors of Penn Central on December 31, 1968 knew, in the exercise of their duties, or reasonably ought to have known, of facts concerning their company's financial condition which were of vital concern to the New Haven's Trustees and creditors but not disclosed to them. The purpose of mentioning this is to make clear that in ruling on the present issues, this court is in no wise [sic] adjudicating any question of fraud or reckless mismanagement which is the functional equivalent of fraud. It expressly reserves jurisdiction to hear and decide such questions as may arise out of any non-disclosure of material information relating to the transfer of the New Haven's properties to Penn Central, and the promise by the latter to pay for them the price which the Supreme Court determined to be fair and equitable insofar as such questions concern the interests of the bankrupt New Haven Railroad.

It must be remembered that the early time of the transfer of properties and assets of the New Haven on December 31, 1968 in advance of a final judicial determination of the actual price to be paid and on payment by the Penn Central of only a small fraction of what that price was ultimately held to be, was not sought by any of the parties. Rather it was imposed by ruling of the I.C.C. and the order of this court. At that time it was opposed by Penn Central in an effort to compel the approval, in substance, of the I.C.C.'s findings and conclusions relative to price as a condition precedent to its taking over the New Haven; and the New Haven First Mortgage Bondholders were calling for liquidation. The Trustes of the New Haven simply followed the directions of this court. The transfer was not effected in the interest of or for the benefit of the New Haven's creditors. It was done simply and solely in the public interest to keep the trains of the New Haven running. The New Haven Railroad faced a grave emergency. It had suffered

and was continuing to suffer staggering losses so that its operations could not be continued beyond 1968. The price issue could not possibly, short of stipulation, be finally adjudicated until after 1968, and immediate inclusion in spite of no final price determination was the only solution.

There remain for discussion the assertions by the Penn Central Trustees and the I.C.C. that the public interest requires that the New Haven properties conveyed to Penn Central be held free of any lien and available to be encumbered by, or expended for losses incurred in the deficit operation of keeping the Penn Central trains going in the public interest.

The Penn Central Trustees argue as follows:

> "The equities favoring the Penn Central's unencumbered ownership of the former New Haven assets, on the other hand, are overwhelming. First, as the Commission and courts have recognized, 'the first policy to be served in reorganization proceedings is "continued operation of the property * *."' Fourth Supplemental Report and Order, 334 I.C.C. 25, 61 (1968). Transfer of the New Haven Assets was designed to further this interest:
>
> > 'A total abandonment of the NH would be inconsistent with the public interest * * * Operation by Penn Central, on the other hand, provides a feasible and achievable alternative. Yet, in order for Penn-Central to effectively rescue the NH operations, it must be free to conduct them according to the dictates of good and efficient management as an integrated part of its own system. *This it cannot do if it must take the NH properties without the power of disposition over them and subject to the creditors' liens.*' 344 I.C.C. at 75 (Emphasis added.)

> The central reason for ordering inclusion of the New Haven assets on December 31, 1968, 'free and clear of all liens and encumbrances,' was to facilitate the maintenance of the railroad as an operating entity in the public interest."

In the *New Haven Inclusion Cases*, however, the Supreme Court said:

> "After 35 years of § 77, as amended, it is unnecessary to reanvass the two basic objectives of the statute—the conservation of the debtor's assets for the benefit of creditors and the preservation of an on-going railroad in the public interest." 399 U.S. at 431, 90 S.Ct. at 2078.

It is quite clear that a bankrupt railroad's estate (which is to say the owners of rail securities) must sustain the burden of losses incurred in a deficit operation for a reasonable period following the petition in bankruptcy and before abandonment to enable governmental officials and those who represent the public to take steps to preserve railroad transportation service if they are satisfied it is in the public interest to do so. In the *New Haven Inclusion Cases*, 399 U.S. at 491, 90 S.Ct. at 2109, the court said:

> "The rights of the bondholders are not absolute. As we have had occasion to say before, security holders
>
> > 'cannot be called upon to sacrifice their property so that a depression-proof railroad system might be created. But they invested their capital in a public utility that does owe an obligation to the public. * * * [B]y their entry into a railroad enterprise, [they] assumed the risk that in any depression or any reorganization the interests of the public would be considered as well as theirs.' Reconstruction Finance Corp. v. Denver & R. G. W. R. Co., 328 U.S. 495, 535–536, 66 S.Ct. 1282, 90 L.Ed. 1400."

But the public interest cannot demand the erosion of the bankrupt's assets to the point of confiscating practically the entire estate. At some point the extent and degree of taking runs into the constitutional prohibition in the Fifth Amendment the taking of private property for public use without just compensation. The time needed to afford the public a fair opportunity to take the necessary action to provide for the continuance of rail service rests in the sound discretion of the reorganization court. The estate of the New Haven Railroad lost between 60 and 70 million dollars in maintaining its deficit operation up to January 1, 1969. This court held that any further erosion of the estate of the New Haven in the public interest would be an unconstitutional taking of private property without just compensation and this was affirmed by the Supreme Court. 399 U.S. at 466, 90 S.Ct. 2054.

The Commission, however, had taken a view which appeared to arrogate to itself almost absolute authority over the extent to which a debtor railroad's estate could be consumed in compelling it to continue a deficit of operation.

In its Fourth Supplemental Report, 344 I.C.C. 25 at 55-56, the I.C.C. in discussing Railroad Commission of Texas v. Eastern Texas RR., 264 U.S. 79, 44 S.Ct. 247, 68 L.Ed. 569 (1924), held that " * * * if at any time it develops with reasonable certainty that future operation must be at a loss, the company may discontinue operation and get what it can out of the property by dismantling the road. To compel it to go on at a loss or to give up the salvage value would be to take its property without just compensation which is a part of due process of law."

The Commission went on to mention that the *Eastern Texas* case cited Brooks-Scanlon Co. v. Railroad Commission of Louisiana, 251 U.S. 396, 40 S.Ct. 183, 64 L.Ed. 323 (1920), which had held that a railroad may abandon even a branch line that loses money and cited in support of this,

Munn v. Illinois, 94 U.S. 113, 126, 24 L.Ed. 77 (1876). It then stated that the *Munn* and *Scanlon* cases had been overruled *sub silentio* by Colorado v. United States, 271 U.S. 153, 166, 168, 46 S.Ct. 452, 70 L.Ed. 878 (1926), which preserved "the Commission's role in weighing the advantages and disadvantages of abandonment of branch lines." Through further discussion in the report and in its briefs and oral arguments the Commission seemed to have adopted a general doctrine that it had the power to compell the continued deficit operations, *regardless of devastating losses*, provided, it could find it was in the public interest to do so. Pursuant to this theory it decided that, despite the New Haven estate's losses of 60 to 70 million by December 31, 1968, it could withhold the right to abandon for another year and thereby saddle the New Haven with at least another $15 million in losses. The Supreme Court rejected the Commission's claims. 399 U.S. 457–467, 90 S.Ct. 2054. In spite of this the Commission now objects to the imposition of an equitable lien on the former New Haven properties to secure the payment for those very some [sic] properties, on the ground that it might interfere with the further consumption of those assets if it became necessary to dispose of them in the course of continuing Penn Central's deficit operation in the public interest.

In oral argument on its statement of position concerning the declaration of an equitable lien the Commission said:

> "* * * the committee in its reply brief would apparently read that lien to mean that New Haven would be entitled to satisfaction of New Haven's claims against Penn Central in the form of a receipt of the proceeds from the sale of the former New Haven assets and Mr. Auerbach has essentially repeated that message this morning.
>
> But those proceeds may indeed be needed for operations of Penn Central." Tr. pp. 58–59.

And this in spite of the fact that in its Fourth Supplemental Report, 344 I.C.C. 75, the Commission said:

> "The NH creditors *are guaranteed* just and reasonable compensation and other terms for their interests in the NH, whenever distribution of the compensation shall occur, whether at the time of or after the properties pass to Penn Central. Since Penn Central must include the NH and must pay a price just and reasonable to all concerned, the creditors lose nothing, vis-a-vis Penn Central, by having *their liens* transferred from the NH properties to the consideration which Penn Central will eventually have to pay." (Emphasis supplied.)

But guaranteed by what?

By mid-night December 31, 1968 the public interest had extracted the last penny which it could constitutionally take from the property and assets of the bankrupt New Haven estate. The Supreme Court had so decided. It said, 399 U.S. at 466, 90 S.Ct. at 2096:

> "We think the reorganization court was entirely correct in concluding that:
>
> > 'The policy of imposing an interim burden of losses, through its deficit operation, on a railroad in reorganization is to afford a reasonable opportunity to the responsible agencies to arrange the continuation of the railroad's operation, but the law does not require the furnishing of two or three or four opportunities. The duty was more than amply fulfilled by the New Haven. The public interest has had one huge bite of the apple; it is not entitled to another.' 304 F.Supp. 793, at 801."

It also approved this court's finding "'* * * * that the continued erosion of the Debtor's estate from operational losses

after the end of 1968 will clearly constitute a taking of the Debtor's property and consequently the interests of the bondholders, without just compensation. It is therefore constitutionaliy impermissible, and obviously no reorganization plan which calls for such a taking can be approved.' 289 F.Supp. 451, at 459.'' 399 U.S. at 491, 90 S.Ct. at 2109.

The constitutionally forbidden erosion which could not be imposed directly cannot now be accomplished indirectly by preventing and withholding the declaration of an equitable lien. Such a lien is required to protect the already adjudicated constitutional rights of the New Haven estate. It must be reiterated that the conveyance of the transportation plant of the New Haven Railroad to the Penn Central in advance of the determination of the price to be paid for it, was made solely for and on behalf of the public interest, but there is a constitutional bar which prevents the public interest from extracting anything further out of the assets of the New Haven. The only other party affected is the Penn Central, and certainly it has no right in law or equity to take the valuable properties and assets of the New Haven estate for a small fraction of their fair value.

There are sufficient bases discussed earlier in this opinion to warrant the declaration of an equitable lien on the transferred property in favor of the New Haven estate. But even if those grounds did not exist, the present circumstances in which the Penn Central seeks to prevent the granting of any security for the $132,000,000, rightfully owed, and from the beginning agreed by the contracting parties to be a *liened* claim in favor of the New Haven bondholders and also seeks to appropriate and use the properties to cover its own deficit operations or to secure its own creditors, reenforced by the position of the I.C.C. that the former New Haven properties and assets must be left unencumbered so that they may be available for further erosion by supporting a continuing deficit operation in the public in-

terest, all point to the absolute necessity for imposing an equitable lien on the properties and assets to protect and preserve the rights and interest declared by the Supreme Court to belong to the New Haven estate and to prevent their being dissipated away by persons who are not entitled to them.

As stated at the outset, the facts and circumstances of this case are entirely unique. The reports show no case even roughly comparable. Equity did not cease to function on the date of the last decision which imposed an equitable lien on property. If ever an equitable remedy was called for, it is here in this case. It is the only means by which the rights of the New Haven creditors can be protected. The Penn Central asserts that only two of the four States, in which the New Haven Railroad ran, recognize the doctrine of equitable lien. But that is not so. The doctrine is recognized in all four of the States,[5] and when remedial justice requires, the equity court will impose an equitable lien on personal property as well as on real estate, Porter v. Searle, 228 F.2d 748 (10 Cir. 1955); Caldwell v. Armstrong, *supra*, and it is the opinion of this court that the courts of

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[5] New York and Rhode Island have long recognized the doctrine of equitable liens. Birnbaum v. Rollerama, Inc., 232 N.Y.S. 2d 188 (Sup.Ct. 1962); Zeiser v. Cohn, 207 N.Y. 407, 101 N.E. 184 (1913); Passarelli v. Passarelli, 94 R.I. 157, 179 A.2d 330 (1962). While Massachusetts did not recognize the doctrine prior to 1912, Ahrend v. Odiorne, 118 Mass. 261 (1875), it has given effect to equitable liens since that date. Beacon Trust Company v. Dolan, 27 F.2d 247 (1 Cir. 1928); Westall v. Wood, 212 Mass. 540, 99 N.E. 325 (1912). In Connecticut, the courts have indicated a readiness to apply equitable liens in an appropriate case. Gruss v. Miskinis, 130 Conn. 367, 34 A.2d 600 (1943); see also Hall v. Hall, 50 Conn. 104 (1882); Chapman v. Beardsley, 31 Conn. 115 (1862).

If the lien law to be applied here were limited to that of only one of the four states, presumably it would be that of New York. See Section 29 of the Agreement, dated April 21, 1966, between The Pennsylvania Railroad Company, The New York Central Railroad Company, and the Trustees of the New Haven. And New York law unequivocally supports the equitable lien as a "recognized agency of remedial justice." Zeiser v. Cohn, supra.

last resort of all of the States, if they had this case before them, would hold it to be one in which the doctrine of equitable lien could be considered and applied.

But irrespective of state law the federal interest in bankruptcy and reorganization is paramount, and where circumstances warrant, as in the case at bar, a federal court would be justified in declaring an equitable lien to accomplish a just reorganization. See Hurley v. Atchison, T. & S. F. Railway Co., 213 U.S. 126, S.Ct. 466, 53 L.Ed. 729 (1909). This is consistent with many rulings where the bankruptcy court, applying equitable principles, did not feel constrained by state law. Thus while state laws normally determine property rights and interests, they will not be allowed to subvert the general policies of the Bankruptcy Act, and a bankruptcy court may, when necessary, determine property interests, irrespective of state law, to implement those policies.[9] For example, equitable principles governing bankruptcy distribution require the bankruptcy court to allow a claim of interest on interest. Vanston Bondholders Protective Committee v. Green, 329 U.S. 156, 67 S.Ct. 237, 91 L.Ed. 162 (1946). And the principles of equitable subordination are not controlled by state law. Prudence Realization Corp. v. Geist, 316 U.S. 89, 62 S.Ct. 978, 86 L.Ed. 1293 (1942); Pepper v. Litton, 308 U.S. 295, 60 S. Ct. 238, 84 L.Ed. 281 (1939); Taylor v. Standard Gas & Electric Co., 306 U.S. 307, 59 S.Ct. 543, 83 L.Ed. 669 (1939). In Prudence Realization Corp. v. Geist the Court said, 316 U.S. at 95, 62 S.Ct. at 982:

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[9] Board of Trade of City of Chicago v. Johnson, 264 U.S. 1, 44 S.Ct. 232, 68 L.Ed. 533 (1924), held that a bankrupt's seat on the Board of Trade constituted a property interest under the Bankruptcy Act which passed to the trustee, although under state law there was no property interest reachable by creditors; Lines v. Frederick, 400 U.S. 18, 91 S.Ct. 113, 27 L.Ed.2d 124 (1970), held that accrued vacation pay of a bankrupt wage earner was not property which passed to his trustee because of the policy of the Bankruptcy Act in relation to wage earners.

"Nothing decided in Erie R. Co. v. Tompkins [304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188] requires a court of bankruptcy to apply * * * a local rule governing the liquidation of insolvent estates. * * * The court of bankruptcy is a court of equity * * and it is for that court — not without appropriate regard for rights acquired under rules of state law — to define and apply federal law in determining the extent to which the inequitable conduct of a claimant in acquiring or asserting his claim in bankruptcy requires its subordination to other claims which, in other respects, are of the same class."

Constructive Trust on Grand Central Terminal Properties

(Including discussion of ¶ E, note 2, supra)

All of the reasons supporting an equitable lien, discussed above, support an adjudication that the property interest in the Grand Central Terminal properties, which the New Haven transferred to Penn Central, is subject to a construction trust in the New Haven's favor.

Originally, this reorganization court, with the aid of a special master, undertook its own resolution of the legal question as to whether the New Haven had a property interest in the terminal properties that would survive a cessation of rail operations by the New Haven, and the court concluded that the New Haven did have such an interest which should be measured by the capitalization of one-half of the excess income remaining after satisfaction of the terminal expenses. Thereafter the Commission fixed this value at $28,438,000 and both this court and the Supreme Court approved.

This court now concludes that a constructive trust in the foregoing amount should attach to all of the terminal properties as of December 31, 1968; and, additionally, as to the

actual monies received by Penn Central, on or after July 1, 1971, from those properties, one-half of the excess income is impressed with a trust in favor of the New Haven estate.

Subjecting the properties to a constructive trust as of December 31, 1968 is fair to both the New Haven and Penn Central. It protects the New Haven estate's interest from being subjected to mortgage and other creditor interests of Penn Central whose equities are junior to those of the New Haven. Since the properties involved are non-operating properties, the revesting in the New Haven of its transferred title and rights does not affect Penn Central's rail operations, and the revesting protects the New Haven against conveyances of and encumbrances upon those interests without the New Haven being paid the value of its interest, which, incidentally, is roughly equivalent to the overall increase in price which this court adjudged and the Supreme Court affirmed. After stating that "fairness and equity" forbid approval of only a fractional payment of New Haven's value, the Supreme Court added: "And the same considerations of fairness and equity prevent imposing on Penn Central the burden of immediate payment in full * * *," 399 U.S. at 488, 90 S.Ct. at 2108.

In testing the order for a declaration of a constructive trust by these criteria the court has given weight to these considerations: (a) if sales or other similar dispositions of Grand Central properties are made, an appropriate liquidation of the New Haven's interest under the constructive trust is not burdensome upon Penn Central; (b) immediate payment will be required only out of income currently realized from non-rail operations, which will be relatively small in amount when compared to the total amount due by Penn Central, i.e., $132 million; (c) the date of July 1, 1971 comes a year after Penn Central went into bankruptcy and after the Supreme Court enunciated this balance of fairness approach; and (d) the payment is necessary to preserve the

New Haven reorganization. The New Haven's assets consist of approximately $14 million in cash or cash equivalents, and its claim against Penn Central. Following cessation of dividend and interest payments by Penn Central, the income of the New Haven estate became essentially limited to the earnings of the cash equivalents — treasury bills, certificates of deposit, and the like. On the other hand, the estate has approximately $52 million of administrative claims which include $7 million or more of tort claims, mostly FELA cases, $12.5 million due the United States on defaulted trustees' certificates, and $17 million of real estate taxes in addition to pre-bankruptcy liened real estate taxes. Shortly after Penn Central's bankruptcy, necessity required this court, on July 6, 1970, to order the general suspension of payment of claims, although the needs of many creditors — both taxing authorities and injured persons — were great, and the appeals of the seriously injured employees and passengers on humane grounds have been very compelling. Recently, because of these considerations, the court has modified its suspension order to permit the resumption of small quarterly payments on the liquidated tort claims. Funds must be husbanded to keep the Trustee's small staff intact, and to press and safeguard the New Haven's one main asset — the amount justly due to it by the Penn Central. After balancing the equities, this court believes that equity and good conscience require that beginning on July 1, 1971, one-half of the excess income from the Grand Central properties be impressed with a constructive trust. This does not prejudice Penn Central, for it is not entitled to operate on other people's money. Moreover, the Penn Central reorganization court has declared that the Penn Central is not insolvent.

Interest

So that the New Haven estate is fully compensated for the balance of over $132 million due it, the estate is entitled to interest from December 31, 1968 at the ap-

propriate legal rate, with appropriate credits given Penn Central for dividends and interest paid by it and for any payments made on principal, such as the one-half of the proceeds from the sales of former New Haven real estate in the approximate amount of $9 million.

REMAND

(including discussion of ¶ A and ¶ B, note 2, supra.)

The New Haven's plan of reorganization should be remanded to the Interstate Commerce Commission subject to the legal rulings made in this opinion and also to certain legal rulings in this court's Memorandum of Decision on Distributive or Step II Portion of Fourth Supplemental Report and Order of Interstate Commerce Commission rendered on July 28, 1969, 304 F.Supp. 1121. Among other things these concern the accrual of interest and penalties on tax claims, the need to satisfy counsel fees and trustees' certificates in cash, and the provision that any claim covered by the Plan could be settled and paid in cash, subject to the approval of the reorganization court, up to the time of the consummation of the Plan. These legal rulings should stand.

Plan formulation for the New Haven is for the I.C.C. and this court. Similarly, plan formulation of Penn Central is, of course, for the I.C.C. and the Penn Central reorganization court. This court trusts that if it is at all feasible, a plan for the reorganization of the New Haven will be formulated without awaiting the reorganization of Penn Central. The two estates, however, are so intertwined that this may not be practical.

This court recapitulates its principal rulings as follows: that it has plenary jurisdiction to construe and implement the mandate of the Supreme Court; that this obligates the Penn Central Trustees to see that the New Haven estate is fully compensated for the remaining balance of $132 million;

and that under the unusual circumstances of this case this court should and does declare an equitable lien in favor of the New Haven on the tangible property, exclusive of rolling stock, conveyed by it to Penn Central and also declares a constructive trust, in the New Haven's favor, to the extent of the capitalized value of one-half of the excess income received from the Grand Central properties. It remands the plan of reorganization to the Interstate Commerce Commission to carry out and implement this court's adjudication.

SETTLE ORDER on or before 10:30 a.m., June 22, 1971.

In Proceedings for the Reorganization of a Railroad.

In the Matter of The NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor.
No. 30226.

UNITED STATES DISTRICT COURT,
D. CONNECTICUT.
JUNE 22, 1971.

ORDER OF REMAND ON JUDGMENT OF SUPREME COURT IN THE NEW HAVEN INCLUSION CASES

ANDERSON, Circuit Judge.*

The Interstate Commerce Commission (the "Commission") having certified to this court on December 2, 1968, a plan of reorganization (the "Plan") for the Debtor, as set forth in the Commission's Fourth Supplemental Report on Reconsideration and Further Hearing, dated November 25, 1968 (334 I.C.C. 25), providing for the Debtor's reorganization in two distinct steps, the first of which being a conveyance of the Debtor's assets and operations to Penn Central Company (now Penn Central Transportation Company) ("Penn Central") by January 1, 1969, and Step II of which being the terms of treatment of persons having an equity in the Debtor's estate in the light of the consideration to be received upon such conveyance; and

Objections to the Plan and claims for equitable treatment thereunder having been filed with this court pursuant to its order dated December 3, 1968, and this court having heard on December 20, 1968, the positions of all interested persons with regard to prompt inclusion of the Debtor's operations in the Penn Central system, and having entered its Order No. 559 on December 24, 1968 directing the Trustees of the property of the Debtor to convey the Debtor's

* Sitting by designation.

assets to Penn Central and effect the inclusion of the Debtor's operations in the Penn Central system effective at 11:59 p.m. on December 31, 1968, and having directed Penn Central to carry out such inclusion and to pay the consideration, including the assumption of certain obligations and cancellation of certain indebtedness specified in the Plan, while expressly providing that the same would be without prejudice to the right of any party to contest the fairness and adequacy of the consideration and reserving jurisdiction to adjudicate all of the objections and claims for equitable treatment theretofore filed; and

The conveyance and inclusion having been effected in accordance with Order No. 559, and this court having, in accordance with its reservation of jurisdiction and following receipt of briefs and a hearing, entered an order on July 28, 1969 adjudging the price to be paid by Penn Central for the assets conveyed to it on December 31, 1968, and approving and disapproving certain provisions of Step II of the Plan, and remanding the Plan to the Commission; and appeals and cross appeals from said Order having been taken to the Court of Appeals, which consolidated the same into one case dealing with the issue of consideration and a second dealing with the provisions of Step II; and

The Supreme Court having granted certiorari in the case dealing with the issue of consideration prior to judgment in the Court of Appeals, and having decided the case on June 29, 1970 (New Haven Inclusion Cases, 399 U.S. 382, 90 S.Ct. 2054, 26 L.Ed.2d 691) and its judgment having been filed with this court on July 31, 1970; and

The Court of Appeals, on motion of the parties, having remanded to this court the consolidated cases before it dealing with the provisions of Step II of the Plan; and

On August 10, 1970, this court having directed the Trustee of the Debtor's property and any other parties desiring to be heard to file written statements of position,

particularly with respect to six designated subjects, to be considered by this court in connection with the form of order to be issued in carrying out the terms of the decision of the Supreme Court; and statements of position and briefs having been filed by various persons, including the Trustee of the Debtor's property, the Commission, the United States, and the Trustees in reorganization of the property of Penn Central, pursuant to said order, and this court having heard all persons desiring to be heard; and

On June 11, 1971, this court having filed its Memorandum of Decision on Issue of Equitable Lien and Other Matters Preliminary to Remand to Interstate Commerce Commission and ordered that a decree in accordance therewith be settled on June 22, 1971, and having heard all parties in interest desiring to be heard;

It is ordered that:

1. The value of the Debtor's assets conveyed to Penn Central on December 31, 1968, and the amount required to be paid therefor, is $174,635,899, against which Penn Central is entitled to the following credits:

$14,000,000	cancellation of indebtedness represented by $14,000,000 principal amount of trustees' certificates issued to Penn Central by Trustees of the Debtor's property
133,333	cancellation of accrued interest on above-described trustees' certificates
2,958,667	cash payment made on December 31, 1968
4,908,000	assumption of Debtor's obligations to former employees for vacation pay
2,400,000	assumption of Debtor's obligation under bonds issued in connection with reorganization of Boston and Providence Railroad Corporation
8,416,730	assumption of Debtor's obligations under its Harlem River Division Bonds (based upon Commission's Fourth and Fifth Supplemental Reports)
54,450	cash payment made on November 11, 1969
9,068,661	cash payment made on January 28, 1971
$41,939,841	

The Debtor's estate is entitled to be fully compensated for the balance of $132,696,058, subject to adjustments hereinafter provided.

2. The remainder of the purchase price in the amount of $132,696,058 computed pursuant to paragraph 1, shall be increased by interest on the amounts from time to time unpaid from December 31, 1968 at the legal rate of interest in effect from time to time in the State of New York, as applicable upon the unpaid balance of the purchase price fixed in paragraph 1, until date of payment; and shall be reduced by all interest and dividends received by the Trustee of the property of the Debtor on the 956,576 shares of common stock of Penn Central Company and the $34,025,800 principal amount of Divisional First Mortgage Bonds of Penn Central held by him, together with interest thereon similarly computed.

3. The Trustee of the property of the Debtor shall hold the above-described common stock and bonds of Penn Central as security for the obligations of Penn Central fixed in paragraphs 1 and 2, and to the extent such security is liquidated or is retained under a plan of reorganization Penn Central shall be credited with the fair value thereof.

4. All the tangible property conveyed by the Debtor to Penn Central on December 31, 1968, except rolling stock and the portions of other tangible property as have heretofore been sold by Penn Central or the Trustees in reorganization of its property, is hereby declared subject to an equitable lien as of December 31, 1968 to secure the claims of the Debtor against Penn Central as set forth in paragraphs 1 and 2. So far as the so-called Harlem River Division is concerned, the equitable lien shall be junior to the lien of the mortgage securing the Harlem River Division Bonds.

5. All the right, title and interest of the Debtor in and to the "Grand Central Terminal Property" as set forth in

the assignment dated December 31, 1968 from the Trustees of the property of the Debtor to Penn Central shall be held in trust by Penn Central, or the Trustees in reorganization of its property, for the benefit of the Debtor until the Debtor's estate shall have received $28,438,000, plus interest, from the Grand Central Terminal Property, or the obligations of Penn Central as set forth in paragraphs 1 and 2 have been discharged in full.

6. One-half the excess income from the Grand Central Terminal Property, as determined pursuant to the Supreme Court's decision in the New Haven Inclusion Cases, *supra*, pp. 438–451, 90 S.Ct. 2054, 26 L.Ed.2d 691, shall, commencing July 1, 1971, accrue to the account of the Trustee for the New Haven estate.

7. The Plan is remanded to the Commission for further proceedings in accordance with the decision of the Supreme Court in the New Haven Inclusion Cases, *supra*, this Order, and this court's Order Approving and Disapproving Certain Step II Provisions of the Plan, dated July 28, 1969.

8. The present Order is to be carried out by the Commission in accordance with the Memorandum of Decision of this Court dated June 11, 1971.

Nos. 71-14-01 and 71-14-51

MAY 24 1972

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

IN THE MATTER OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, *Debtor*

RICHARD JOYCE SMITH, Trustee of the Property of the New York, New Haven and Hartford Railroad Company, *Debtor*, *Petitioner in No. 71-14-01*

and

LAWRENCE W. IANNOTTI, Successor Trustee Under the First and Refunding 4% Mortgage Bonds, Dated as of July 1, 1947, of the New York, New Haven and Hartford Railroad Company, *Debtor*, *Petitioner in No. 71-14-51*

v.

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR. and WILLARD WIRTZ, Trustees of the Property of Penn Central Transportation Company, Debtor; MANUFACTURERS HANOVER TRUST COMPANY, as Mortgage Trustee; and PENN CENTRAL TRANSPORTATION COMPANY, *Respondents*

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR. and WILLARD WIRTZ, TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR, IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Nos. 71-14-01 and 71-14-51

IN THE MATTER OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, *Debtor*

RICHARD JOYCE SMITH, Trustee of the Property of the New York, New Haven and Hartford Railroad Company, *Debtor*, *Petitioner in No. 71-14-01*

and

LAWRENCE W. IANNOTTI, Successor Trustee Under the First and Refunding 4% Mortgage Bonds, Dated as of July 1, 1947, of the New York, New Haven and Hartford Railroad Company, *Debtor*, *Petitioner in No. 71-14-51*

v.

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR. and WILLARD WIRTZ, Trustees of the Property of Penn Central Transportation Company, Debtor; MANUFACTURERS HANOVER TRUST COMPANY, as Mortgage Trustee; and PENN CENTRAL TRANSPORTATION COMPANY, *Respondents*

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR. and WILLARD WIRTZ, TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR, IN OPPOSITION

OPINIONS BELOW

The memorandum of decision of the District Court for the District of Connecticut dated June 11, 1971 is reported at 330 F. Supp. 131, and its order of June 22, 1971 is reported at 331 F. Supp. 212. They are reprinted in the Appendix to the petition in No. 71-14-01

at pages A25-A60 and A61-A65 respectively. The opinion in the United States Court of Appeals for the Second Circuit dated March 17, 1972 is not yet reported. It is reprinted in the Appendix to the petition in No. 71-14-01 at pages A5-A24.

JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit was filed on March 17, 1972. The petition for a writ of certiorari in No. 71-14-01 was filed on April 28, 1972, and the petition in No. 71-14-51 on May 5, 1972. The jurisdiction of this Court is sought to be invoked under 28 U.S.C. §§ 1254(1) and 2101(c).

QUESTION PRESENTED

In December 1968 the District Court for the District of Connecticut—the New Haven Reorganization Court—ordered the New Haven properties transferred to Penn Central free and clear of all liens and encumbrances. In June 1970 the properties came into the possession of, and are now being operated by, the District Court for the Eastern District of Pennsylvania—the Penn Central Reorganization Court. Did the court below properly conclude that the New Haven Reorganization Court had no jurisdiction, in June 1971, to impose an equitable lien and constructive trust on the former New Haven properties?

STATUTES INVOLVED

The relevant sections of the Bankruptcy Act (11 U.S. §§ 1 *et seq.*) are set out in the Appendix to the petition in No. 71-14-01.

STATEMENT

This case is the latest in the continuing controversies arising out of the bankruptcy of the New Haven. The earlier history is described in the opinion of this Court in *New Haven Inclusion Cases,* 399 U.S. 392. The facts now relevant can be briefly summarized as follows:

In 1962 the Pennsylvania Railroad (Penn) and the New York Central (Central) sought authority from the Interstate Commerce Commission (Commission) to merge. The Trustees[1] of the New York, New Haven and Hartford Railroad Co. (New Haven), then and now in proceedings for reorganization before the United States District Court for the District of Connecticut (New Haven Court) intervened in the merger proceeding and petitioned for inclusion of the New Haven in the proposed Penn Central. Penn and Central resisted the inclusion, but in order to obtain Commission approval of the merger, Penn and Central executed a purchase agreement with the New Haven Trustees. That agreement, as later amended, provided for the acquisition by the proposed Penn Central of the New Haven's rail operations and properties. The agreed price for these assets was 950,000 shares of Penn Central common stock, $23 million in Divisional First Mortgage Bonds secured by the New Haven properties, $8 million in cash and the assumption of certain specified New Haven liabilities.[2] In its Second

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[1] The sole remaining New Haven Trustee is a petitioner herein.

[2] A New Haven Trustee later testified: "One of the principles for which we negotiated at considerable length was that the bulk of the consideration should be in the form of common stock . . . which would permit the claimants to the New Haven's Estate to participate in the benefits of the [Penn Central] merger." See New Haven Inclusion Cases, 399 U.S. at pp. 483-484.

Supplemental Report, 331 I.C.C. 643 (1967), the Commission approved the Purchase Agreement as the basis for inclusion. The Commission recognized that the New Haven properties had "neither earning power nor the prospect of earning power" (331 I.C.C. at p. 687), but held that as a condition to their merger Penn and Central could and should be required to pay a price determined as though the New Haven were being liquidated. It found that that price was $125 million, and that the consideration to be given by Penn Central was worth that amount.

Review of this action of the Commission was sought by creditors of the New Haven in both the New Haven Court and a statutory three-judge district court. These courts found that the Commission had understated the New Haven's liquidation value and overstated the value of the consideration to be paid by Penn Central. *In re New York, N. H. & H. R.R.*, 289 F. Supp. 451 (D. Conn. 1968); *New York, N. H. & H. R.R. First Mortgage 4% Bondholders' Committee* v. *United States*, 289 F. Supp. 418 (S.D.N.Y. 1968). In its opinion the New Haven Court also threatened, because of substantial continuing losses by the New Haven, to shut down all operations on the New Haven on January 1, 1969, if they had not by that date been taken over by Penn Central.

On remand from the two courts the Commission, in its Fourth Supplemental Report, 334 I.C.C. 25 (1968), increased the consideration to be paid by Penn Central to $145.6 million. It also ordered Penn Central to take over the New Haven's assets by the end of 1968 and concurrently to pay this increased purchase price, whether or not final judicial review of the financial terms had occurred.

Thereafter, on December 24, 1968, the New Haven Court entered an order approving the transfer of the New Haven's assets to Penn Central. That transfer was, with certain specified exceptions not here relevant, to be

> "a binding transfer to the Penn Central Company free and clear of all liens, charges and encumbrances . . . ."

This was in conformity with Section XII of the New Haven's Plan of Reorganization, as adopted by the Commission (334 I.C.C. at 119):

> "The property dealt with by the plan, when transferred and conveyed to Penn Central . . . , shall be free and clear of all claims of the debtor, its creditors and stockholders and all other persons, unless otherwise specifically provided in the . . . present report . . . ."

Inclusion occurred at midnight, December 31, 1968. The consideration prescribed by the Commission was concurrently paid in full by Penn Central. Neither the New Haven Trustees nor any New Haven creditor sought review of the transfer orders.

With inclusion and payment effected, New Haven creditors sought to require an additional payment by Penn Central, seeking review of the Commission's orders in both the New Haven Court and the statutory district court in New York. The New Haven court increased by $29,035,899 the consideration Penn Central was to pay for assuming the New Haven's deficit operations, and in addition devised a so-called "underwriting plan" to cushion the New Haven estate against a decline in the value of Penn Central common stock below $87.50 per share. *In re New York, N.H. &*

H. R.R., 304 F. Supp. 1136 (1969). The statutory district court, on the other hand, affirmed, with minor modifications, the price fixed by the Commission, and accepted the underwriting plan.[3] *New York, N.H. & H. R.R. First Mortgage 4% Bondholders Committee* v. *United States*, 305 F. Supp. 1049 (S.D.N.Y. 1969).

Both decisions were before this Court, and had been argued and were under consideration, when on June 21, 1970 Penn Central filed its petition under Section 77 of the Bankruptcy Act (11 U.S.C. § 205) in the United States District Court for the Eastern District of Pennsylvania (Philadelphia Court). The Philadelphia Court, by its Order No. 1, approved the petition on the same day as properly filed. It thus obtained, under Section 77(a), "exclusive jurisdiction of the debtor and its property wherever located." Its Order No. 1 also included the following provision:

> "9. All persons and all firms and corporations, whatsoever and wheresoever situated, located or domiciled, hereby are restrained and enjoined from interfering with, seizing, converting, appropriating, attaching, garnisheeing, levying upon, or enforcing liens upon, or in any manner whatsoever disturbing any portion of the assets, goods, money, deposit balances, credits, choses in action, interests, railroads, properties or premises belonging to, or in the possession of the Debtor as owner, lessee or otherwise, or from taking possession of or from entering upon, or in any way interfering with the same, or any part thereof, or from interfering in any manner with the operation of said railroads, properties or premises or the carrying on of its business by the Debtor under the order

[3] The underwriting plan, which imposed a personal, unsecured contingent obligation on Penn Central, was accepted by the Commission in its Fifth Supplemental Report, 334 I.C.C. 528 (1969).

> of this Court and from commencing or continuing any proceeding against the Debtor, whether for obtaining or for the enforcement of any judgment or decree or for any other purpose, ..."

Eight days later, on June 29, 1970, this Court handed down its decision, 399 U.S. 392. The Court affirmed the decision of the New Haven Court that the consideration should be increased by $29,035,899. It also, in view of "the impact of recent events,"[4] set aside the order of the New Haven Court insofar as it had been determined that the Penn Central stock which the New Haven had received from Penn Central had an intrinsic value of $87.50 per share, and had formulated the underwriting plan. It remanded the cause for further consideration by "the Commission and the appropriate federal courts" of issues involving "the form that Penn Central's consideration to New Haven should properly take and the status of the New Haven estate as a shareholder or creditor of Penn Central." 399 U.S. at p. 489.

The only reference in the Court's opinion to the Penn Central bankruptcy appears in an unnumbered first footnote, which notes the filing of the petition under Section 77 eight days before, and states (399 U.S. at 399):

> "Whether the financial obligations dealt with in the present opinion may become subject to modification in or because of those proceedings is a

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[4] The underwriting plan was based on an "intrinsic value" of 87½ for Penn Central stock. On January 2, 1969, immediately following inclusion, the price on the New York Stock Exchange closed at 64. On March 30, 1970, the date of oral argument in this Court, the price closed at 23⅞. On April 30 it was 18; on May 30 it was 12⅝.

question with which the present opinion in no way deals."

On August 10, 1970, the New Haven Court, instead of remanding the cause to the Commission, entered an order directing all parties to file statements of position on certain specified issues as to which, the court indicated, it might give directions to the Commission in its remand order. Among those issues were:

1. Whether the New Haven Court had jurisdiction to impose an equitable lien on the former New Haven assets, and, if so, whether the court should impose it.

2. Whether the court could, and should, order payment to the New Haven Trustee of proceeds of future sales of former New Haven properties covered by the Divisional First Mortgage.

3. Whether the court could, and should, order the Penn Central Trustees to pay to the New Haven Trustee one-half of the "excess income" from the so-called Grand Central Terminal properties.[5]

The Penn Central Trustees, while not parties to the New Haven reorganization proceedings (Penn Central

[5] In the New Haven inclusion proceedings it was determined that the New Haven was entitled to a share of the "excess income" from the Grand Central Terminal properties (the office building and hotel income less Grand Central Terminal expenses). That entitlement was conveyed to the Penn Central as part of the New Haven inclusion on December 31, 1968. The New Haven's interest was found by the Commission to have a capitalized value of $28,438,000; its decision was affirmed by the New Haven Court and by this Court. As a result, $28,438,000 was included in the price paid by Penn Central for the New Haven estate on December 31, 1968.

itself was), appeared before the New Haven court and urged that the New Haven Court was without jurisdiction to enter the orders it proposed, and in any event should not do so.[6] However, on June 11, 1971, the New Haven Court filed its Memorandum of Opinion and announced it would settle its order on June 22, 1971. On that day, pursuant to an order of the Philadelphia Court issued the previous day, as more fully explained below, the Penn Central Trustees again appeared and challenged the jurisdiction of the court and the merits of its proposed order. Nonetheless, the New Haven Court entered its "Order of Remand," in which—

1. It purported to determine the amount of New Haven's claim against the Penn Central estate by determining the number and amount of proper offsets against the total purchase price which had been determined by this Court in the *New Haven Inclusion Cases.*

2. It purported to determine that interest was due on the "unpaid balance" from December 31, 1968, and the rate to be applied. The "unpaid balance" recognized no credit whatever for the bonds and stock paid to the New Haven Trustee on December 31, 1968.

3. It purported to set aside the purchase and sale of the New Haven assets by stating that the bonds and stock paid to the New Haven Trustee

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[6] In their first appearance in the New Haven court, the Penn Central Trustees' counsel moved that the Trustees' participation "shall be without prejudice to their right to take such action as they may deem appropriate in the [Philadelphia court] or any other court in respect of the exercise of jurisdiction by this court over such Trustees or the debtor [Penn Central] or the property of the debtor." The motion was never ruled on.

on December 31, 1968 should be deemed only "security" for the purchase price.

4. It purported to declare that "all the tangible property" conveyed by the New Haven to Penn Central on December 31, 1968 (except rolling stock and property already sold by Penn Central) is "subject to an equitable lien as of December 31, 1968," to secure the total purchase price.

5. It purported to declare that "all the right, title and interest" of the New Haven in the Grand Central Terminal properties "shall be held in trust" by Penn Central or its Trustees for the benefit of the New Haven until the New Haven shall have received $28,438,000.

6. It purported to order that beginning on July 1, 1971, one-half of the excess income from the Grand Central Terminal properties shall "accrue to the account of the Trustee for the New Haven estate."

7. And it remanded the proceedings to the Commission for further proceedings in accordance with its opinion and order and the opinion of this Court.

On the same day, the New Haven Court appointed special counsel to take steps to "preserve" the equitable lien and constructive trust. On August 23, 1971 the court approved a petition for compensation to that counsel for such services, including the recording of the lien and trust in various jurisdictions.

Meanwhile, there were related proceedings in the Philadelphia Court. As already noted, on June 21, 1971, that court (1) ordered the Penn Central Trustees

to appear on the following day in the New Haven Court and object to the entry of any order beyond the jurisdiction of the New Haven Court or which would interfere with the reorganization of Penn Central; (2) enjoined any action to enforce or collect any claim against Penn Central arising out of the New Haven inclusion other than in the Philadelphia Court, or any action that would interfere with the jurisdiction of that court to deal with properties in its possession; (3) directed the Penn Central Trustees to continue to devote all income from the Grand Central Terminal properties to defray current Penn Central expenses; and directed the Penn Central Trustees not to pay any money, from any source, to the New Haven Trustee.

In the same order, the Philadelphia Court noticed a hearing "at which . . . this court will consider whether it should adjudicate, and may adjudicate, the rights of the Trustees in the properties conveyed" by the New Haven, "and will determine whether or not to continue the foregoing relief, and to consider such other and further relief as may be required to preserve and effectuate the jurisdiction of this Court." Following that hearing, in which counsel for the New Haven Trustee participated, on December 31, 1971 the court filed an extensive opinion. *In the Matter of Penn Central Transportation Company, Debtor,* 337 F. Supp. 779.[7]

After a review of the opinion of this Court in the *New Haven Inclusion Cases,* the Philadelphia Court concluded that this Court had not suggested that the Philadelphia Court refrain from carrying out its functions under Section 77, which included the responsi-

[7] For the convenience of the Court, the opinion and order of the Philadelphia Court are reproduced in the Appendix to this brief.

bility of determining the amount of an unsatisfied debt, deciding whether it is secured or unsecured, and classifying the various claimants for purposes of a reorganization plan. Moreover, it concluded that since the New Haven assets had been conveyed to Penn Central free and clear of liens, and were in the ownership and possession of Penn Central on the date of bankruptcy, the filing of Penn Central's Section 77 petition "vested exclusive jurisdiction over those assets in this [Philadelphia] court, and made it jurisdictionally impossible for any other court to impose liens upon them, except with the approval of this court."

Noting that the New Haven Trustee had filed in May 1971 in the Penn Central proceedings a proof of claim for the same amount which it asserted to be due in the proceedings before the New Haven Court, and that the deadline for filing objections had not yet been fixed and many parties potentially affected by the New Haven claim had no notice or opportunity to object, the court stated its belief that it would invade the "absolute constitutional right" of the other creditors were the court now to adjudicate the New Haven claims. Its order, in consequence, provides that the restraints which it had imposed by its order of June 21, 1971, *supra,* be continued; that the ultimate disposition of the New Haven claim be deferred to the regular program for handling claims; but in order to avoid any prejudice to the New Haven pending final decision—

> "That, without prejudice to the ultimate resolution of the merits of the claims asserted, the Trustee of the New York, New Haven & Hartford Railroad shall, unless and until otherwise ordered by this Court or an appellate court of competent jurisdiction, be deemed to have a lien, indeterminate in amount, and indeterminate as to priority,

upon all of the real property and readily identifiable tangible personal property (exclusive of rolling stock) conveyed to Penn Central by the said New Haven Trustee as of December 31, 1968, and remaining in possession of the Trustees of the Debtor as of June 11, 1971."

The order of the Philadelphia Court has been appealed by various New Haven interests to the Court of Appeals for the Third Circuit.[8]

The court below, on March 17, 1972, reversed the order of the New Haven Court on the ground that it lacked jurisdiction, and remanded the cause to the Commission for further proceedings. Each of the bases of jurisdiction urged to support the order of the New Haven Court was discussed and rejected. Judge Mansfield concurred in the conclusions that the New Haven Court lacked jurisdiction and that the cause should be remanded to the Commission, but dissented from what he assumed to be the position of the majority that ultimate review of the Commission's action would be the sole responsibility of the Philadelphia Court.

ARGUMENT

This case raises no question that deserves review by this Court at this time. It presents the single issue whether the New Haven Reorganization Court had

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[8] In the matter of Penn Central Transportation Company, Debtor, Nos. 72-1172 through 72-1180. An earlier appeal by the New Haven interests from the order of the Philadelphia Court of June 21, 1971, was dismissed without prejudice and the parties remanded to the Philadelphia Court. In the Matter of Penn Central Transportation Company, Debtor, 454 F.2d 210 (3rd Cir. Jan. 3, 1972).

jurisdiction to encumber property which it disposed of several years before and which is now in the possession of and being administered by the Penn Central Reorganization Court. This issue turns on particular facts which are unique, as petitioner in No. 71-14-51 admits (Petition, p. 12). The case therefore raises no question of general importance in the administration of the bankruptcy laws; petitioners refer to a number of railroads now in bankruptcy but they do not and cannot suggest that the issue they seek to present here has arisen, or is likely to arise, in any of those proceedings.

Furthermore, petitioners seek review at a point in time when the problem of the status of the New Haven's claim in the Penn Central bankruptcy remains in an inchoate state. Neither the Commission nor any court has determined as of what date or on what basis the assets delivered by Penn Central to the New Haven are to be valued. Accordingly, the amount of any unpaid claim that the New Haven may have against Penn Central is still indefinite. Neither the Commission nor any court has determined the form of the consideration that the New Haven is entitled to receive for any unpaid portion of its claim against the Penn Central estate. The Commission has not yet had an opportunity to carry forward its sensible suggestion to consolidate the Penn Central and the New Haven proceedings so that it may determine in a single and comprehensive setting what will be fair and equitable to the creditors of both estates. The Penn Central Reorganization Court has in large measure now given the New Haven Trustee the protection he sought from the New Haven Court by providing that the New Haven has a lien, indeterminate in amount and indeterminate as to

priority, pending a final resolution of the problems arising in the two bankruptcies. In these circumstances petitioners' assertion that there is a threat of immediate injury to constitutional rights is without foundation. This Court's review of petitioners' constitutional and other arguments should be deferred until they can be considered in a more specific and immediate context.

In any event, the issue raised by the petitions was correctly decided below.

I

We are aware of no instance in which a Section 77 court, or indeed any bankruptcy court, has sought to assert a jurisdiction comparable to that claimed by the New Haven Court in this instance. That court, in December 1968, approved the sale to Penn Central of the property here sought to be encumbered, expressly providing that the sale was to be "a binding transfer . . . free and clear of all liens, charges and encumbrances." No one appealed from that order. On June 21, 1970, when the Philadelphia Court approved Penn Central's petition for reorganization under Section 77, the property became a part of the property now owned by, operated by and in the possession of the Penn Central Trustees. The court below unanimously and correctly concluded that by the specific terms of Section 77(a) the Philadelphia Court obtained "exclusive jurisdiction of the debtor and its property wherever located," and that in those circumstances the New Haven Court was without jurisdiction to encumber assets over which the Philadelphia Court had exclusive jurisdiction.

II

The decision is in accord with the only previous decision by this Court dealing with a conflict between the respective jurisdictions of two Section 77 reorganization courts. In *Warren* v. *Palmer,* 310 U.S. 132, the New Haven, which was then in an earlier Section 77 reorganization in the District of Connecticut, had leased railroad lines from the Boston & Providence Railroad. The leases were rejected by the New Haven Trustee pursuant to Section 77(c)(6), but operations were continued by the New Haven for the account of the lessor. The Boston & Providence later filed its petition for reorganization under Section 77 in the District of Massachusetts. When the Connecticut Section 77 court declared that the losses of the Boston & Providence were a first lien on its property, the Boston & Providence appealed, arguing that, as lessor, it owned the property and hence the Massachusetts court had exclusive jurisdiction to declare any lien thereon. In deciding that the Connecticut court had exclusive jurisdiction, this Court emphasized the public importance of rail service and the fact that the physical possession of the Boston & Providence property was in that court. It construed Section 77 as intended (310 U.S. at p. 140) to—

> "give *the court charged with operation* the fullest ability to secure the necessities of operation—an intention to give *the operating court* power to promise those having the materials, men and equipment needed for the operation a first lien on the road to secure payment for the operation." (Italics supplied.)

There, when possession and operation were in the Connecticut court, the fact that legal title was in the

Massachusetts court was not enough to support its jurisdiction. Here, possession, operation and title all are in the Philadelphia Court. The New Haven Court, once also charged with operating a railroad, no longer has that position; it now sits merely as a court of liquidation, administering the consideration received for the New Haven assets. In contrast the Philadelphia Court bears the responsibility for maintaining the operations of and supervising the efforts to reorganize one of the largest and most important rail systems in the United States, a responsibility that requires the court to deal with a multiplicity of problems whose complexity and difficulty need no elaboration. For all these reasons, this case is *Warren* v. *Palmer a fortiori*. *See also Gardner* v. *New Jersey*, 329 U.S. 565; *Callaway* v. *Benton*, 336 U.S. 132; *Thompson* v. *Terminal Shares, Inc.*, 104 F.2d 1 (8th Cir. 1939); *Collier on Bankruptcy*, Vol. 2, pars. 23.03, 23.04.

As the court below observed (Pet. in No. 71-14-01, App. p. A16), recognition of the New Haven Court's assertion of jurisdiction

> "could, at this stage of the Penn Central reorganization proceedings, seriously impair the formulation of a workable plan for the financial resuscitation of Penn Central by the Commission and the ability of the Pennsylvania reorganization court to administer the entire Penn Central system . . . ."

III

The argument by petitioners that the jurisdiction claimed by the New Haven Court was in some way conferred by the mandate of this Court in the *New Haven Inclusion Cases, supra*, is without substance. The remand, "to the Commission and the appropriate

federal courts," was "to determine the form that Penn Central's consideration to New Haven should properly take and the status of the New Haven estate as a shareholder or creditor of Penn Central." 399 U.S. at p. 489. This conferred no power to the New Haven Court to create or declare retroactive security interests in property no longer in its possession. As noted above, the first footnote in this Court's opinion in the *New Haven Inclusion Cases* expressly states that its opinion "in no way deals" with the effect of the Penn Central bankruptcy on the litigation. 399 U.S. at 399, note. Indeed, in the light of Section 77(a) and the decision in *Warren* v. *Palmer,* only the most explicit language could warrant a conclusion that this Court intended to compromise the powers, duties and responsibilities of the Philadelphia Court. The remand "to the Commission" ordered by the court below fully carries out this Court's remand "to the Commission and the appropriate federal courts."[9]

IV

The other contentions urged in support of jurisdiction in the New Haven Court are equally without substance. That the Penn Central Trustees had appeared before the New Haven Court to protest its action could not, as the court below held, cure the lack of subject-matter jurisdiction; petitioners do not now argue to the contrary.

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[9] Although the court below did not have to reach the point, the decision by the New Haven Court directing the decisions to be reached by the Interstate Commerce Commission improperly invaded the Commission's jurisdiction as well as that of the Philadelphia Court. See Ecker v. Western Pac. R.R., 318 U.S. 448, 474; Chicago, R.I. & P. Ry. v. Fleming, 157 F.2d 241, 244 (7th Cir. 1946), *cert. denied,* 329 U.S. 780; Collier on Bankruptcy, Vol. 5, par. 77.14, p. 539.

Nor is there merit in the argument that the New Haven Court retained jurisdiction over properties which it transferred by sale "free and clear of all liens, charges and encumbrances" and over which the Philadelphia Court now has exclusive jurisdiction. As the court below pointed out (Pet. in No. 71-14-01, App. p. A17), even had it done so, the reservation could not prevail, under Section 77(a) and the decision in *Warren* v. *Palmer, supra,* to permit an interference with the responsibilities of the Philadelphia Court. In fact, however, the New Haven Court reserved jurisdiction only to pass upon objections to the amount and the form of consideration *which had been previously filed with the court*—a recognition that the transfer of the assets did not preclude the continuance of the controversy as to the price to be paid by Penn Central which was finally settled by this Court in the *New Haven Inclusion Cases.*[10]

V

A final comment is appropriate on petitioners' contention that the decision below deprives the New Haven estate of essential protection. As already noted, the New Haven Trustee has submitted the New Haven

[10] On March 31-April 2, 1969, the New Haven Court held hearings called "hearing and argument on all remaining objections to the plan of reorganization and claims for equitable treatment." At the outset the court noted that, since ample notice had been given requiring the filing of such objections and claims, any further filings were barred (Tr., March 31, 1969, p. 16). The hearings centered around claims that the price to the Penn Central should be increased, but no equitable lien or constructive trust, or any similar security interest, was claimed. It was more than a year after the New Haven Court had ordered the transfer of the New Haven properties to Penn Central before any such claim was made.

claim, including the claim to an equitable lien and a constructive trust, to the jurisdiction of the Philadelphia Court. That court, to ensure against prejudice to the New Haven claim, has taken the unusual step of according the New Haven interim protection pending a final hearing by providing that the New Haven has a lien on all its former real property and readily identifiable personal property, indeterminate in amount and indeterminate as to priority, pending final decision on its claim. That final decision is unquestionably the responsibility of the Philadelphia Court under Section 77(c)(7). *Isaac* v. *Hobbs Tie & Timber Co.*, 282 U.S. 734; *Ex parte Baldwin*, 291 U.S. 610; *Collier on Bankruptcy*, Vol. 2, par. 23.04. That court has evidenced its intention to exercise its jurisdiction in that respect, with due regard to the rights of all other Penn Central creditors. Moreover, the New Haven has a legal lien on all former New Haven real property given to secure the Divisional First Mortgage and bonds of Penn Central which it holds. Finally, with respect to the only property not covered by the legal lien of the mortgage or the interim lien declared by the Philadelphia Court—a share of the "excess income" from the Grand Central Terminal properties (see 399 U.S. at 438-451)—the decision by the Philadelphia Court refusing to recognize the New Haven claim to a constructive trust thereto is now before the Court of Appeals for the Third Circuit (p. 13, n.), and is appropriately to be resolved in that litigation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In the Matter of PENN CENTRAL TRANSPORTATION COMPANY, Debtor	In Proceedings for the Reorganization of a Railroad No. 70-347

[In re: Claim of Richard Joyce Smith, Trustee of the N.Y., N.H. & H. Railroad]

Opinion

Order No. 546

FULLAM, J. December 31, 1971

The Trustees have petitioned for determination of the issues raised by the proof of claim filed by the reorganization Trustee of the New York, New Haven and Hartford Railroad Company (hereinafter "New Haven Trustee"), and certain related applications by the Trustees for interim relief. The claim in question is an outgrowth of the litigation which culminated in the decision of the Supreme Court in the *New Haven Inclusion Cases*, 399 U.S. 392 (1970). The New Haven Trustee asserts that these issues have already been decided by the United States District Court for the District of Connecticut, which has jurisdiction over the New Haven reorganization.

I. Background

On March 6, 1962, the Pennsylvania Railroad Company and the New York Central Railroad Company made application to the Interstate Commerce Commission under Section 5(b) of the Interstate Commerce Act (49 U.S.C. §5(b)(1), for approval of a proposed merger of the two railroads into what ultimately became the Penn Central Transportation Company, the Debtor herein.

On June 26, 1962, the New Haven, then in reorganization for the second time in less than 20 years, sought inclusion in the merger. Eventually, over the objections of the merger proponents, the Commission, by its order of April 6, 1966, made its approval of the merger conditional upon inclusion of the New Haven, on terms to be negotiated by the parties, subject to the approval of the I.C.C. and the New Haven reorganization court. 327 ICC 475, 553. It was recognized that any attempt to recapitalize the New Haven and include it as an operating company would be pointless in view of its hopelessly deteriorating financial condition. Accordingly, the outright sale of the New Haven's assets was the method of inclusion selected. This transaction was to constitute the first step of a two-step reorganization plan for the New Haven. *New Haven Inclusion Cases*, 399 U.S. 392, 410 at n. 45 (1970).

The New Haven Trustee and the merger proponents originally agreed that a fair purchase price for the New Haven assets would be $125,000,000. The Commission also approved this price,[1] which was to be paid by a "package" consisting of $8,000,000 in cash, $23,000,000 in (divisional) first mortgage bonds, the assumption of certain New Haven liabilities, closing adjustments, and the issuance of shares of common stock in the new corporation. The parties, and the Commission, valued the common stock at $87.50 per share; thus the stock constituted the major part of the consideration flowing to the New Haven estate. It is conceded that this feature of the transaction was eagerly sought by the New Haven estate.

While the transaction as thus formulated was designed to produce the equivalent of $125,000,000 for the New Haven estate, the Commission further found that it would cost Penn Central the equivalent of $157,000,000, largely because of the interim and continuing losses of the New Haven

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[1] 331 ICC 627, 692.

which the Penn Central would be required to assume. Thus, Penn Central would pay $157,000,000 in exchange for assets having only negative earning power. But, apparently convinced that the merger would "save" upwards of $80,000,000 per year, the Commission concluded that the inclusion of the New Haven on the above terms "would be both 'just and reasonable' as a condition of the merger under §5 . . . and 'fair and equitable' as part of a plan of reorganization under §77. . . ." *New Haven Inclusion Cases,* 399 U.S. 392, 413 (1970).

At this point, procedural complications developed. The I.C.C. order was subject to dual review: in the Connecticut District Court, and in a three-judge statutory court in the Southern District of New York. The former had jurisdiction over the reorganization of the New Haven, the latter over the merger (and the related inclusion) under §5 of the Interstate Commerce Act. Appeals were taken to both courts, by New Haven creditor groups asserting that the price was too low, and by various parties opposed to the merger, the New Haven inclusion, or both.

The Connecticut Court concluded that the New Haven assets were worth between $33,000,000 and $55,000,000 more than the agreed price, *In re New York, N.H. & H.R.R.,* 289 F.Supp. 451, 465 (D.C. Conn. 1968), while the merger court concluded that the deficiency was in the range of $45,000,000 to $50,000,000. *N.Y., N.H. & H.R.R., First Mtg. 4% Bondholders' Committee v. United States,* 289 F.Supp. 418, 440 (S.D.N.Y. 1968).

On remand, again in a combined proceeding involving both the merger and the reorganization, the I.C.C. increased the price by some $37,700,000, but allowed certain further deductions totaling $22,100,000, thus producing a net price increase of $15,600,000. The total price set by the Commission was approximately $145,600,000. The increase was to be paid by issuing $7.4 million more of divisional mortgage bonds, and by assuming certain additional liabilities.

By this time, the New Haven was in such desperate straits that cessation of rail services appeared imminent. Accordingly, the I.C.C. concluded that the assets should be immediately transferred to Penn Central, and Penn Central should be required to take over the New Haven's operations, without awaiting final judicial review of the price. This was accomplished, pursuant to the I.C.C. opinion and an order of the New Haven reorganization court, as of December 31, 1968, by an outright conveyance to Penn Central "free and clear of liens." The price set by the I.C.C. was paid, subject to adjustment on appeal.

On the second round of appeals, the merger court generally upheld the I.C.C., but made some adjustments which increased the price by about $90,000. *N.Y., N.H. & H.R.R., First Mtg. 4% Bondholders' Committee v. United States,* 305 F. Supp. 1049 (S.D.N.Y. 1969). This, too, was paid. However, the reorganization court increased the price by some $29,000,000. *In re N.Y., N.H. & H.R.R.,* 304 F.Supp. 793 and 304 F.Supp. 1136 (D. Conn. 1969).

When the merger was originally consummated in 1966, the median price of Penn Central stock was $87.50. By the time of the conveyance of the New Haven assets on December 31, 1968, the price had declined to an average of about $69.50 per share, *see: New Haven Inclusion Cases,* 399 U.S. at 485, but all concerned apparently felt that the long-range benefits of the merger would improve the market. Accordingly, in authorizing the New Haven Trustee to accept 950,000 shares of Penn Central stock as representing payment of $83,125,000 of the purchase price, the Connecticut court imposed on Penn Central an underwriting plan which in effect required Penn Central to guarantee that the stock would again reach $87.50 per share by February 1, 1978; otherwise, Penn Central would pay the New Haven Trustee the difference in cash. *See* 304 F.Supp. at 808-810.

Appeals from the orders of both courts were pending before the Supreme Court when the Penn Central went into

bankruptcy. Eight days later, on June 29, 1970, the Supreme Court decided the pending appeals. *New Haven Inclusion Cases*, 399 U.S. 392 (1970). The Court (a) affirmed the New Haven reorganization court's determination that the correct price for the New Haven assets was $174,000,000; (b) vacated that part of the reorganization court's judgment which set up the underwriting plan; and (c) directed the merger court to abstain "pending the further proceedings before the I.C.C. and the reviewing courts under Section 77 of the Bankruptcy Act."

As can be seen from the foregoing recital, there were two separate issues involved throughout these proceedings: the value of the New Haven assets, and the value of the consideration to be furnished by Penn Central. When the I.C.C. and the lower courts considered the case, the value of the assets was decreasing, even negative; whereas the value of the consideration was thought to be likely to increase. By discarding going-concern, or income-producing, approaches, and choosing a liquidation hypothesis, the reorganization court established a floor under the declining asset value. And its underwriting provision was designed to insure that the consideration value would correspond to the price thus fixed.

By the time the Supreme Court decided the case, it was apparent that the underwriting scheme was no longer feasible.

II. The Issues

Before attempting to discuss the precise extent of this Court's jurisdiction and the desirability *vel non* of its exercise, it may be helpful to review the issues which, in consequence of the Supreme Court's decision, remain open for further consideration. Unfortunately, even this subject is not free from doubt.

It is clear that the value of the New Haven assets which were conveyed to Penn Central as of December 31, 1968,

has been finally and unalterably fixed at $174,000,000. If the "package" of consideration previously furnished by Penn Central were to be valued as of the time of payment and treated as an accomplished fact, then the only remaining issue would be the form of payment of the $28,000,000 balance. But the Court has expressly stated that, in the light of intervening events, the underwriting scheme which was designed to produce a value of $87.50 per share of the common stock "may be wholly unrealistic." From this it can be argued, either that the Court intended that only the underwriting scheme should be reconsidered, or that the true value of the "package" as of December 31, 1968, should be reappraised in the light of subsequent events, or that the entire "package" should be reevaluated as of present day values. There is language in the Court's opinion which can be construed as lending support to each of these possible constructions.

The Court stated, 399 U.S. 392, at p. 489:

> "Accordingly, we set aside the order of the Connecticut District Court *insofar as it determines that an intrinsic value of $87.50 inheres in the Penn Central common stock and implements an underwriting plan to secure payment of that sum.* Further proceedings before the Commission and the appropriate federal courts will be necessary to determine the form that Penn Central's consideration to New Haven should properly take and the status of the New Haven estate as a shareholder or creditor of Penn Central." [emphasis added]

However, immediately preceding this language, the Court stated (pp. 488-89):

> "The fairness and equity that are the essence of a Section 77 proceeding forbid our approval of a payment for the transferred New Haven properties that may be worth only a fraction of its purported value. And the same considerations of fairness and equity prevent imposing on Penn Central the burden of immediate payment in full, particularly when it is re-

membered that the New Haven bondholders have never objected to the receipt of Penn Central stock in exchange for the New Haven assets."

Elsewhere (at pp. 489-90), in discussing the constitutional rights of the bondholders, the Court stated:

". . . The purchase price that the Commission and the reorganization court have required Penn Central to pay to the New Haven estate is based upon the liquidation value of the seller's assets, appraised as of December 31, 1966. That price hypothesizes a shutdown of New Haven followed by a sell-off of its assets at their highest and best value. In the circumstances of this case, and for the reasons we have already set out at length, we agree with the reorganization court that it would be unfair and inequitable to allow Penn Central to take the properties for any lesser sum. Moreover, *we today require a reassessment of the consideration* that Penn Central is to give in exchange for those properties. We thereby accord the bondholders the right to a liquidation and a per parcel sale that is theirs by virtue of their mortgage lien. . . ." [emphasis added]

And finally, there is at least surface inconsistency between the Court's language at page 488:

". . . But we cannot avoid the impact of recent events in assessing the propriety of the decree that [the reorganization] court has entered. . . ."

and the express disclaimer set forth in a prefatory footnote in which, after noting the commencement of Penn Central's reorganization proceeding, the Court stated:

"Whether the financial obligations dealt with in the present opinion may become subject to modification in or because of those proceedings is a question with which the present opinion in no way deals."

In view of the fact that the opinion was filed shortly after Penn Central's bankruptcy, and that the implications of the bankruptcy had not been briefed or argued, it may

well be that the "recent events" mentioned in the text referred to the pre-bankruptcy decline in Penn Central's fortunes, and not to the bankruptcy itself. Another possible way to reconcile these two comments might be to construe the Supreme Court's mandate as directing that the underwriting scheme, or the valuation of the entire package of consideration, must be reconsidered by reason of the intervening bankruptcy, but without any attempt on the part of the Court to suggest what effect, if any, the intervening bankruptcy should have on the result. Or, the Court may merely have wished to make clear that, whatever the outcome of its mandated reevaluation, various parties in interest in the Penn Central reorganization proceeding would still be able to challenge it in this reorganization proceeding.

To summarize, the issues which remained to be decided after the Court's action include at least (1) the method of payment of the $28,000,000 increase; (2) the underwriting scheme, or a substitute therefore; (3) whether the stock transaction can or should be rescinded, or recast; (4) whether the New Haven estate can or should be accorded the status of a secured creditor with respect to some or all of the further consideration to be furnished; and (5) the treatment to be accorded whatever claims emerge from decision of the foregoing issues, in the Penn Central bankruptcy proceeding.

III. Post-Bankruptcy Events

Since the opinion of the Supreme Court was handed down, the litigation has followed a potentially awkward course both in this court and in the Connecticut court, generating the specific controversies which this court is now asked to consider. In this court, the New Haven Trustee, in May of 1971, filed a proof of claim, as a secured creditor, in the sum of $132,000,000. This amount was arrived at by deducting from the $174,000,000 total purchase price approved by the Supreme Court the various

cash payments which have been made, the face value of the mortgage bonds which have been issued, and certain obligations assumed by Penn Central. Thus, the New Haven proof of claim asserts that the New Haven is a secured creditor for the full balance of the purchase price, plus interest thereon, without any adjustment for the 950,000 shares of Penn Central stock.

The Connecticut court filed an opinion and on June 11, 1971, entered an order,[2] which, in remanding the case to the Interstate Commerce Commission, imposed an "equitable lien" in favor of the New Haven, upon all of the former New Haven assets conveyed to Penn Central (except rolling stock) for the full balance of the purchase price (*i.e.*, $174,000,000, less cash payments on account, obligations assumed, and mortgage bonds issued); declared the existence of a "constructive trust" in one-half of the income from the Grand Central Terminal properties in New York, in the sum of $28,000,000; concluded that the 950,000 shares of Penn Central stock which were part of the original purchase price paid in 1968 should now be regarded as being held merely as security for the payment of the full balance; and directed the Interstate Commerce Commission to implement these provisions in carrying out its mandate. The Connecticut court also, acting on its own motion, designated a named attorney as the representative of the court to take immediate steps to record the "equitable lien" wherever necessary under state law, in the four states in which the former New Haven assets were thought to be located. An appeal from these orders is now pending before the Court of Appeals for the Second Circuit.

The Trustees of the Debtor sought interim relief in this Court from certain aspects of the Connecticut court's order. By Order No. 296, this request was granted in part, in an order directed only to the litigants, and those in privity

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[2] *See: In re N.Y., N.H. & H.R.R.*, 330 F.Supp. 131; 331 F.Supp. 212 (D. Conn., 1971).

with them, and designed only to preserve the *status quo* pending ultimate resolution of these issues, by prohibiting any attempts to exact payment. An appeal from this order is now pending before the Court of Appeals for the Third Circuit.

At the same time, the Trustees filed the present application, seeking an immediate determination by this court of the merits of the New Haven Trustee's proof of claim. At the hearing on this application, the New Haven Trustee relied solely upon the opinion and order of the Connecticut court in support of its proof of claim. (Tr. 2730.)

It would be naive to ignore the potential for unseemly conflict between courts of coordinate jurisdiction which inhere in these circumstances and events. On the other hand, however, care must be taken not to exaggerate or unduly emphasize such potential conflict. Where related controversies, or different aspects of the same controversy, are properly presented to two courts for decision, it is sometimes necessary for both courts to express their views. *Cf. Dellinger v. Mitchell*, 442 F.2d 782, 787-88 (D.C. Cir. 1971). The applications now pending in this court cannot be simply ignored, and they cannot be disposed of without considering the jurisdictional and other issues presented. The unique and complex relationship between the two reorganization proceedings, in my judgment, makes it necessary for both courts to decide their respective portions of the issues presented, in the interests of expediting final and conclusive resolution of all of the issues involved in the entire litigation. Every reasonable effort should be made, of course, to minimize differences.

IV. Jurisdiction

As noted above, the Supreme Court held that "further proceedings before the Commission and the appropriate federal courts will be necessary to determine the form that Penn Central's consideration to New Haven should properly take and the status of the New Haven estate as a share-

holder or creditor of Penn Central." From the use of the plural ("courts"), and the fact that the Supreme Court directed the merger court to abstain, it can be argued that the opinion contemplated that this court would be involved in the ultimate determination of some or all of the issues remaining open. Nevertheless, it must be recognized that the litigation in which the opinion was rendered did not originate in this court, and that the Supreme Court's mandate was directed to the Connecticut court. In view of the language quoted above, and the disclaimer in the prefatory footnote at the beginning of the Supreme Court's opinion, this much at least is certain: the Supreme Court has not suggested that this court should refrain from carrying out its functions under the reorganization statute.

In the ordinary course of reorganization, this court, pursuant to Section 77(c)(7) of the Bankruptcy Act, is required to determine the amount of an unliquidated debt, decide whether the claim is secured or unsecured, and classify the various claimants "according to the nature of their respective claims and interests" for purposes of the reorganization plan. 5 *Collier on Bankruptcy*, §§77.20, 77.21; 6A *Collier on Bankruptcy*, §9.02. In carrying out these functions, this court would be bound by principles of *res judicata* and full faith and credit. To the extent that the judgment of the Connecticut court became final, either before bankruptcy or by virtue of the Supreme Court's affirmance shortly after bankruptcy, no question arises. But to the extent that additional obligations are sought to be imposed, or additional liens created, after Penn Central's bankruptcy, without the consent or approval of this Court, very serious jurisdictional questions appear. The Trustees have never been made parties to the proceedings in the Connecticut District Court, nor has anyone sought leave of this court to proceed against them in that regard.

Perhaps this is but another way of pointing out that, since the New Haven assets were conveyed to Penn Central free and clear of all liens, including all claims of the New

Haven estate, on December 31, 1968, and since they remained in the ownership and possession of Penn Central on the date of bankruptcy, the filing of Penn Central's reorganization petition vested exclusive jurisdiction over these assets in this court, and made it jurisdictionally impossible for any other court to impose liens upon them, except with the approval of this court.

Counsel for the New Haven Trustee suggested at oral argument that one solution to this impasse would be for this court now to authorize and direct the Trustees to subject themselves to the jurisdiction of the New Haven court, and thereafter for this court to abstain until final appellate determination in the Second Circuit proceedings. While the thought of allowing the cup thus to pass has considerable appeal, this approach contains its own grave difficulties. In the first place, by the time this suggestion was made, the proceedings in the Connecticut District Court had, to all practical intents and purposes, already terminated.[3] Whether something could have been, or could now be, done to overcome this difficulty need not now be considered. For the due process rights of the Penn Central creditors present a more serious problem.

It is no answer to state that the Trustees act as representatives of the creditors of Penn Central. In a sense this is true, inasmuch as the Trustees do have the obligation to preserve the Debtor's estate for the benefit of all concerned. But the Trustees cannot adequately represent one or more groups of creditors in disputes involving relative priorities of claims.

To the extent that the New Haven Trustee seeks a post-bankruptcy adjudication which would transform its $83.1 million stock transaction into a secured claim, create a further secured claim in the sum of $28,000,000, plus inter-

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[3] The Trustees did appear in some limited fashion in the Connecticut proceeding. The extent of this participation and the procedural adequacy of the proceedings are among the issues now pending on appeal in the Second Circuit.

est on the aggregate sum, and establish some further type of security ("constructive trust") in certain current income of the Debtor, I am convinced that the various creditor interests of Penn Central have an absolute constitutional right to be heard before final decision.[4] I am also satisfied that the only forum in which these interests now can (or, conveniently, ever could) be heard is in the context of the Penn Central reorganization.

Any railroad reorganization proceeding is a complex form of litigation, and has many aspects. The New Haven reorganization is no exception. For present purposes, the Connecticut proceedings can be seen as involving the formulation and implementation of a plan of reorganization of the New Haven, a mandate from the Supreme Court, and litigation which was pending on the date of Penn Central's bankruptcy, in which claims are being asserted against Penn Central. This court has no direct concern with the first two of these three aspects, and should clearly refrain from taking any action which might infringe upon the jurisdiction of the Connecticut court. However, insofar as new or additional claims are being asserted therein against the Debtor's estate, I am required to decide whether the assertion of these claims in that forum should be permitted to continue, in view of the Penn Central bankruptcy and the stay of suits provisions of Order No. 1 herein.

As between the New Haven Trustee and the Debtor, these claims, notwithstanding their unusual ramifications, are

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[4] New or additional credit aggregating hundreds of millions of dollars was extended to Penn Central between December 31, 1968, and the date of bankruptcy. Additional obligations, both secured and unsecured, were incurred. These creditors may be able to establish that they relied in part upon the "free and clear" (former) New Haven assets, and that actual or constructive notice that the full purchase price was not finally settled would not constitute notice of a potential retroactive lien, especially with regard to payments already made. At least, their opportunity to attempt such proof cannot be foreclosed.

essentially pre-bankruptcy claims, contractual in nature. They were submitted to the jurisdiction of this court when the New Haven Trustee filed his proof of claim in these proceedings, an event which occurred before the Connecticut court's adjudication.

The leading case involving the jurisdictional interplay between two railroad reorganization courts is *Warren v. Palmer*, 310 U.S. 132 (1940). The Court held that the reorganization court which had jurisdiction over the debtor in possession of leased lines could impose liens on the leased property for operating expenses, notwithstanding the fact that the lessor was also in reorganization in another court. Since the case involved largely post-bankruptcy issues, and liens which were necessary for the continued operation of rail service, the decision is not directly apposite. However, to the extent that it does bear on the present situation, it lends support to the position of the Penn Central Trustees in this case.

Whether the present issue be regarded as a question of the exercise of this Court's discretion as to whether or not to stay pending litigation in another jurisdiction, or, independently of the "stay of suits" question, the determination as to which of two reorganization courts is the preferable forum, I am constrained to reach the somewhat uncomfortable conclusion that the ultimate decision depends to a large extent upon the result which has been or may be reached in the other jurisdiction. The usual standards to be applied in this situation—impact on the formulation of a reorganization plan and the continuance of rail service, *cf. Warren v. Palmer, supra; Gardner v. New Jersey*, 329 U.S. 565 (1947), and impact on this court's interim administration of the reorganization proceeding, *see Congress of Railway Unions, et al. Appeal*, —— F.2d —— (3d Cir., July 16, 1971)—must be assessed in light of the actual or threatened outcome of the pending litigation.

If the Connecticut court had simply remanded the matter to the Interstate Commerce Commission, the "form" of

Penn Central's consideration and the "status" of the New Haven would presumably be determined by the Commission simultaneously in both the New Haven reorganization proceeding (including the remnants of the merger case) and in the Penn Central reorganization proceeding. It is reasonable to assume that these initial determinations would have been internally consistent. Review would then be available, in the Connecticut court in the New Haven proceeding, and in this court in the Penn Central proceeding. If the two courts then viewed the issues differently, there might be separate appeals in the two proceedings, the parties might agree upon a single appeal, or one court might defer to the other. Since the decision of each court would have had its genesis in a proceeding in which all concerned were heard, some form of unification of the appeal process would probably be feasible. Moreover, there is every reason to suppose that the Commission, which is, after all, primarily responsible for the formulation of reorganization plans, *see Group of Institutional Investors v. Chicago, Minneapolis, St. Paul and P.R. Company*, 318 U.S. 523, 544 (1943); *Reconstruction Finance Corporation v. Denver and Rio Grande and Western Railroad Company*, 328 U.S. 495, 530 (1946), might be expected to resolve these issues in a manner which would withstand attack in both courts. As matters now stand, however (depending in part upon the outcome of the pending appeal in the Second Circuit), it is difficult to see how the Commission, confronted with the order of the Connecticut court, could properly perform its function in either proceeding.

I hasten to emphasize that the Connecticut court has made it clear that it does not view its order as in any way controlling the ultimate disposition of the New Haven Trustee's claim in the reorganization plan of the Penn Central. However, this assurance can be, and is widely interpreted by Penn Central creditor groups as being, limited to the notion that the New Haven Trustee's ultimate participation in a reorganized Penn Central would be deter-

mined in the Penn Central reorganization proceeding. The recalculated amount of the New Haven Trustee's claims, and their character as secured or unsecured, are a different matter; yet these are the critical determinations insofar as Penn Central's other creditors are concerned.

While the existence of a declared lien would ordinarily have little adverse effect upon the interim conduct of the reorganization process, if it were subject to reconsideration in the ultimate reorganization plan, the fact remains that in this case, unless the declared lien is to be simply disregarded, difficult and burdensome accounting procedures might be required. To the extent that the lien purportedly attaches to all of the former New Haven assets (except rolling stock), whether real or personal, thus apparently even including office furniture and supplies, the interference with the orderly process of the reorganization and the operations of the Debtor in the interim is potentially quite substantial. Further, obvious difficulties arise with respect to that part of the Connecticut court's order which imposes a "constructive trust" upon substantial amounts of income now available to the Trustees for operating expenses.

For all of these reasons—the seeming incompleteness of the Connecticut court's jurisdiction, the exclusive jurisdiction of this court over the assets in the possession of the Debtor, and the probable impact upon the reorganization proceedings and the ultimate reorganization plan for Penn Central—if the issues were being presented to this court for completely independent decision, I should be inclined to stay the prosecution of these claims by the New Haven Trustee in other forums. But the Connecticut court's determination of its own jurisdiction is entitled to great weight. Considerations of comity, and due deference to the views of an eminent jurist of exceptional experience in these matters, alike dictate that every effort be made here to avoid reaching a result which might further complicate matters, or seem to interfere unduly in the other related proceeding.

When the case was before the Supreme Court, the basic issues were whether the inclusion terms were "just and reasonable" under §5 and "fair and equitable" under §77. The Court held that, inasmuch as Penn Central had agreed to the inclusion, the issue was essentially the same under both statutes, and involved the valuation of the New Haven assets, a task peculiarly within the jurisdiction of the New Haven reorganization. I shall assume that the §5 criterion is no longer open for consideration. But in the present posture of the case, determining what is "fair and equitable" from the standpoint of the New Haven reorganization, or even from the joint standpoint of the New Haven reorganization and a solvent Penn Central in private management, is not necessarily the same as determining what is "fair and equitable" in the total context of both reorganizations.

In short, the result of the ultimate decision of the substantive issues raised here must appear to the Connecticut court to be consistent with a "fair and equitable" plan for the New Haven, and must also appear to this court to be consistent with a "fair and equitable" plan for the Penn Central. Neither court can delegate this decision to the other, nor would abstention be permissible.

Accordingly, it seems appropriate to view the Connecticut court's order of June 11, 1971, as essentially constituting a declaration of what would be consistent with a fair and equitable plan for the New Haven reorganization. But it does not, and in my view cannot, constitute a binding determination of what would be consistent with a "fair and equitable" reorganization of Penn Central.

Determining the components which will go to make up the present liquidated amount of the New Haven claims is one thing; deciding whether the various components are all entitled to the same priority is quite another.

In my judgment, the only conclusion which need now be expressed is that, whatever may be the situation as between the New Haven Trustee and the stockholders of the Debtor,

I do not consider that any issues of relative priority, or of amount (except for the additional $28,000,000), have been determined with finality insofar as other creditors of Penn Central are concerned.

V. The Merits

As stated at the outset, the Trustees are pressing for an immediate ruling on the proof of claim filed in these proceedings by the New Haven Trustee. They have presented extensive argument to the effect that the lien is without legal or equitable basis, is contrary to the law of all of the states in which the property is located, and is otherwise invalid. No doubt the decision of the Second Circuit in the pending appeal will be instructive, or even dispositive, as to many of these issues.

As I view the matter, however, the merits of this claim cannot properly be determined on the present record, in any event. The present posture of the proof of claims program is such that, although the deadline for filing proofs of claim has passed, and the claims which have been filed are being classified and processed, complete lists of the claims have not yet been made a matter of record; and the deadline for filing objections to claims has not yet been fixed. While various creditor interests did get notice of the hearing on the present petition, and some creditor groups have expressed their views on the merits of the New Haven claim, many parties potentially affected thereby have had neither notice nor opportunity to express their views. I refer specifically to the unsecured creditors, who seemingly would be most directly affected by the outcome.

Moreover, as a practical matter, if a plan for Penn Central can be devised which makes adequate provision for all creditors, whether secured or not, the New Haven Trustee's claims will diminish in poignancy. And the underlying constitutional issues can be more clearly perceived and dealt with after the various valuation studies now in progress are completed.

It is a reasonable supposition that the principal objectives of the current efforts by the New Haven Trustee are (a) to insure that he will have standing to object to the sale or other disposition of any substantial portion of the former New Haven assets, or the proceeds of such sales; (b) to provide protection in the event the Penn Central reorganization proceeding is dismissed; and (c) to insure preferred status in the event Penn Central's reorganization plan does not contain adequate provisions for unsecured claims. As set forth earlier, I am satisfied that none of these matters can be finally determined except in these proceedings, after all parties in interest have had an opportunity to be heard. However, I see no reason why reasonably adequate interim protection should not be afforded the claims of the New Haven Trustee.

Accordingly, I have concluded that, pending final determination of all of the issues involved in the appropriate forum or forums, and unless and until otherwise ordered by this court or by an appellate court of competent jurisdiction, the New Haven Trustee shall be deemed to have a tentative lien, indeterminate in amount, upon all real property all readily identifiable personal property (except rolling stock) formerly owned by the New Haven estate and conveyed to the Penn Central as of December 31, 1968, which were still in possession of the Debtor's estate on June 11, 1971. The provisions of Orders Nos. 78 and 192 shall be applicable. This, of course, does not constitute the expression of any view as to the merits of the claim or the asserted lien. The restraints imposed by Order No. 296 will remain in effect.

In order to promote the orderly and expeditious resolution of all of the issues surrounding the New Haven's claims, this court will, on application, at such time as the remand of the inclusion litigation to the I.C.C. becomes effective, certify to the Commission, for its recommendations and report, any appropriate question relating to the

valuation and proper treatment of the claims of the New Haven Trustee, including, by way of illustration: (1) The value of the various items of consideration transferred by Penn Central, on the respective dates of transfer, if no value is attributed to Penn Central's obligations under the underwriting agreement; (2) The value of Penn Central's obligations under the underwriting agreement, reappraised in the light of subsequent events; (3) The separate components of a presently fair and equitable consideration package, and the values of each.

In all other respects, disposition of the issues committed to this court must await the normal processing of the New Haven Trustee's proof of claim.

Order No. 546

AND NOW, this 31st day of December, 1971, it is ORDERED:

1. That, without prejudice to the ultimate resolution of the merits of the claims asserted, the Trustee of the New York, New Haven & Harford Railroad shall, unless and until otherwise ordered by this Court or an appellate court of competent jurisdiction, be deemed to have a lien, indeterminate in amount, and indeterminate as to priority, upon all of the real property and readily identifiable tangible personal property (exclusive of rolling stock) conveyed to Penn Central by the said New Haven Trustee as of December 31, 1968, and remaining in possession of the Trustees of the Debtor as of June 11, 1971.

2. That the provisions of Orders Nos. 78 and 192 shall be fully applicable to transactions respecting said assets.

3. That the restraints imposed by Order No. 296 shall remain in effect until further order of this Court.

4. That this court will entertain applications for reference of appropriate issues to the Interstate Commerce Commission in accordance with the views expressed in the foregoing Opinion.

5. That the ultimate disposition of the claims asserted by the New Haven Trustee is deferred pending completion of the program for handling proofs of claim in these proceedings, and the receipt and consideration of objections in accordance with such program.

/s/ JOHN P. FULLAM
J.

IN THE

Supreme Court of the United States

October Term, 1971

Supreme Court, U. S.
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No. 71-1401

In the Matter of The New York, New Haven and Hartford Railroad Company, Debtor

Richard Joyce Smith, Trustee of the Property of The New York, New Haven and Hartford Railroad Company, Debtor,
Petitioner,

v.

George P. Baker, Richard C. Bond, Jervis Langdon, Jr. and Willard Wirtz, Trustees of the Property of Penn Central Transportation Company, Debtor; Manufacturers Hanover Trust Company, as Mortgage Trustee; and Penn Central Transportation Company,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT MANUFACTURERS HANOVER TRUST COMPANY, AS MORTGAGE TRUSTEE

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Dated: May 26, 1972

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BRIEF OF RESPONDENT MANUFACTURERS HANOVER TRUST COMPANY, AS MORTGAGE TRUSTEE

Preliminary Statement

Respondent Manufacturers Hanover Trust Company ("Manufacturers Hanover"), as Trustee under The New

York Central and Hudson River Railroad Company (the "Central") Three and One-Half Percent Gold Bond Mortgage, dated June 1, 1897 (the "1897 Mortgage"), by its attorneys, respectfully submits this brief in response both to the above-captioned Petition and to No. 71-1451, the similar Petition, dated May 6, 1972, of Lawrence W. Iannotti, Successor Trustee under the First and Refunding 4% Mortgage Bonds, dated as of July 1, 1947, of The New York, New Haven and Hartford Railroad Company, Debtor.[1]

Questions Presented

The principal question raised by these petitions is whether the Court of Appeals correctly held that the New Haven Reorganization Court had no jurisdiction to declare an equitable lien on, and a constructive trust on the income from, various former properties of the New Haven because those properties, which the Penn Central Trustees had legal title to and actual possession of, were under the exclusive jurisdiction of the Penn Central Reorganization Court under Section 77(a) of the Bankruptcy Act, 11 U.S.C.

1. For convenience we have used the same shortened reference forms as those used in the New Haven Trustee's Petition:

"New Haven"—The New York, New Haven and Hartford Railroad Company, Debtor.

"Penn Central"—Penn Central Transportation Company, Debtor.

"New Haven Reorganization Court"—the United States District Court for the District of Connecticut.

"Penn Central Reorganization Court"—the United States District Court for the Eastern District of Pennsylvania.

"Court of Appeals"—the United States Court of Appeals for the Second Circuit.

"Commission"—the Interstate Commerce Commission.

§205(a)? A secondary question raised by the petitions is whether the admittedly important federal question of Section 77(a) jurisdiction has not already been settled by previous decisions of this Court, which were correctly applied by the Court of Appeals in the decision, review of which the New Haven Trustee and Mr. Iannotti now seek?

Statement of Facts

This Court last considered the problems arising out of the various proceedings involving the reorganization of the New Haven, the merger of the Pennsylvania Railroad Company and the Central, and the sale of the New Haven's properties to the newly formed Penn Central in the *New Haven Inclusion Cases*, 399 U.S. 392 (1970). Briefly what had transpired prior to that decision was the following:

July 7, 1961—New Haven enters reorganization under Section 77.

April 6, 1966—Commission approves Penn Central merger subject to the inclusion of the New Haven.

November 19, 1967—Commission prescribes terms for the New Haven's inclusion setting the consideration to be paid by Penn Central at $125 million.

February 1, 1968—Penn Central merger effected.

November 25, 1968—Commission revises the terms for the New Haven's inclusion it prescribed November 19, 1967, increasing the consideration to be paid by Penn Central to $145.6 million.

December 24, 1968—New Haven Reorganization Court orders the transfer of the New Haven's assets to Penn Central by January 1, 1969.

May 28, 1969—New Haven Reorganization Court increases the consideration to be paid by Penn Central to $174.6 million.

June 21, 1970—Penn Central enters reorganization under Section 77.

June 29, 1970—*New Haven Inclusion Cases, supra,* decided.

In the *New Haven Inclusion Cases, supra,* this Court affirmed the decision of the New Haven Reorganization Court setting the consideration to be paid by Penn Central for the New Haven assets at $174.6 million. But, because the major part of that consideration was to be paid in Penn Central stock which in the spring of 1970 was not selling at the $87.50 intrinsic value set by the New Haven Reorganization Court, this Court remanded the case for

> "further proceedings before the Commission and the appropriate federal courts * * * to determine the form that Penn Central's consideration to New Haven should properly take * * *." *New Haven Inclusion Cases, supra* at 489.

Instead of simply remanding the proceedings to the Commission in accordance with this Court's direction, the New Haven Reorganization Court, on August 10, 1970, ordered that the Trustee of the New Haven and all other interested parties file "statements of position" on certain specified issues, as to which, the Court indicated, it might give directions to the Commission in its remand order. Two of the issues listed in the New Haven Reorganization Court's August 10, 1970 Order—whether it could and should declare an equitable lien on the New Haven assets transferred to Penn Central on December 31, 1968 and

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whether it could and should order the Penn Central Trustees to pay the New Haven Trustee half the excess income from the so-called Grand Central Terminal properties[2]—vitally affected the rights of Manufacturers Hanover, as Trustee of the 1897 Mortgage.

The Rights of Manufacturers Hanover, as Trustee of the 1897 Mortgage

In its Statement of Position, filed in response to the New Haven Reorganization Court's August 10, 1970 Order, Manufacturers Hanover, in addition to challenging the Court's power to declare equitable liens on or otherwise affect the property of Penn Central within the exclusive jurisdiction of the Penn Central Reorganization Court, advised the New Haven Reorganization Court of the following.

On June 1, 1897, the Central had mortgaged all its properties to a predecessor of Manufacturers Hanover, as Trustee, to secure an issue of bonds. Included in the trust estate mortgaged by the Central were the Grand Central Terminal properties. There were presently outstanding under the 1897 Mortgage approximately $80,000,000 in bonds, all in default as a result of the Penn Central bankruptcy. Any rights the New Haven had had in the Grand Central Terminal properties arose from a 1907 agreement between the Central and the New Haven for the develop-

2. (A. 26-27). References preceded by the letter "A" are to the pages of the Appendix annexed to the New Haven Trustee's Petition and NOT the Appendix to this brief.

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ment of the Grand Central Terminal area.[3] Regardless of what rights, if any, the New Haven retained in the Grand Central Terminal properties following the transfer of those properties to Penn Central on December 31, 1968, those rights were clearly subordinate to the recorded lien of Manufacturers Hanover, as Trustee of the 1897 Mortgage. Consequently, even if the New Haven Reorganization Court were to conclude that it did have subject matter jurisdiction to declare an equitable lien and to order the Penn Central Trustees to pay half of the excess income from the Grand Central Terminal properties to the New Haven, it could not do so without totally abrogating the rights held by Manufacturers Hanover as Trustee for the holders of the bonds issued under the 1897 Mortgage.

The New Haven Reorganization Court's Order on Remand

On June 22, 1971, nearly a year after this Court had remanded the *New Haven Inclusion Cases, supra,* "for further proceedings before the Commission," the New Haven Reorganization Court in its Order of Remand[4] declared an equitable lien encumbering virtually all the assets which the New Haven had conveyed to Penn Central on December

3. This was the conclusion of the Special Master appointed by the New Haven Reorganization Court to make a legal appraisal of the interests and rights of the New Haven in the Grand Central Terminal properties. The Special Master's report was adopted by the New Haven Reorganization Court and that portion of its decision affirmed by this Court. *In re New York, New Haven and Hartford Railroad Co.*, 289 F. Supp. 451, 463 (1968), *aff'd in part sub nom., New Haven Inclusion Cases, supra* at 438-451.

4. *In the Matter of The New York, New Haven and Hartford Railroad Co., Debtor*, 331 F. Supp. 212 (D. Conn. 1971) (A. 61 *et seq.*).

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1, 1968.[5] In addition, the Order of Remand directed the Penn Central Trustees (i) to hold in trust for the benefit of the New Haven all the right, title and interest in the Grand Central Terminal properties which the New Haven had transferred to Penn Central on December 31, 1968 and (ii) commencing on July 1, 1971, to accrue to the account of the New Haven one-half the excess income from the Grand Central Terminal properties.[6]

The New Haven Reorganization Court's Order of Remand completely ignored the rights in the Grand Central Terminal properties held by Manufacturers Hanover, as Trustee of the 1897 Mortgage, although curiously enough the Court in its accompanying Memorandum of Decision[7] commented on those rights: "* * * Manufacturers Hanover Trust Co., Indenture Trustee under N.Y. Central & Hudson R.R.Co. Gold Bond Mortgage of 1897, claims that the New Haven property comes within the provisions of its mortgage. The Penn Central Trustees do not contradict this."[8]

The New Haven Reorganization Court's Order of Remand was appealed to, and reversed by, the Court of Appeals on March 17, 1972 on the ground that "the district court lacked subject matter jurisdiction under §77(a) of the Bankruptcy Act, 11 U.S.C. §205(a) (1970), to issue the order, since the property affected is within the exclusive jurisdiction of another district court."[9]

5. 331 F. Supp. at 215 (A. 64).

6. 331 F. Supp. at 215-216 (A. 64-65).

7. *In the Matter of The New York, New Haven and Hartford Railroad Co., Debtor,* 330 F. Supp. 131 (D. Conn. 1971) (A. 25 *et seq.*).

8. 330 F. Supp. at 144 (A. 44).

9. *In the Matter of The New York, New Haven and Hartford Railroad Co., Debtor,* —— F. 2d —— (2d Cir. March 17, 1972) (A. 5 *et seq.*).

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Reasons for Denying the Writ

The Court of Appeals Correctly Applied Relevant Decisions of This Court Relating to a Reorganization Court's Exclusive Jurisdiction Under Section 77(a).

Section 77(a) of the Bankruptcy Act, 11 U.S.C. §205(a) (1970), provides in relevant part:

> "If the petition [stating that the railroad is insolvent and wishes to reorganize its capital structure] is so approved [by a judge of the district court of proper venue], the court in which the order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have *exclusive jurisdiction of the debtor and its property wherever located* * * *" (Emphasis added).

When the New Haven Reorganization Court in its Order of Remand imposed an equitable lien on the former New Haven assets conveyed to Penn Central on December 31, 1968 and ordered the Penn Central Trustees to hold Penn Central's Grand Central Terminal properties in trust for the benefit of the New Haven, it was circumventing the unambiguous language of Section 77(a) which granted the Penn Central Reorganization Court exclusive jurisdiction over the property of Penn Central.

The Court of Appeals could have simply relied on Section 77(a) when it reversed the New Haven Reorganization Court's Order of Remand. Instead, however, the Court of Appeals, in a detailed and well-reasoned opinion, reviewed each of the arguments made by the appellants and the appellees on the jurisdictional issue, cited and discussed the relevant decisions of this Court, and then con-

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cluded that under Section 77(a) and the decisions of this Court interpreting Section 77(a) "* * * only the Pennsylvania [i.e., the Penn Central] reorganization court had jurisdiction under §77(a) over the property here in question."[10]

The New Haven Trustee lists four reasons why this Court should review the Court of Appeals decision: (i) only this Court can construe its remand decision in the *New Haven Inclusion Cases, supra,* with finality; (ii) the New Haven Reorganization Court had jurisdiction to protect the constitutional rights of the New Haven creditors; (iii) the Court of Appeals misapplied *Warren* v. *Palmer;*[11] and finally (iv) an argument based on the equities. None of these reasons warrant the grant of certiorari.

1. Finality

The New Haven Trustee argues that this Court is the only Court which can construe its remand decision in the *New Haven Inclusion Cases, supra,* with finality. Clearly, that is so. It is, however, hardly a reason for this Court to issue a writ of certiorari. The relevant question here is whether the Court of Appeals correctly interpreted the *New Haven Inclusion Cases, supra.* A comparison of both opinions shows that it did.

In the *New Haven Inclusion Cases, supra,* this Court remanded the case for "[f]urther proceedings before the Commission and the appropriate federal courts * * * to

10. —— F. 2d at —— (A. 16).

11. 310 U.S. 132 (1940).

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determine the form that Penn Central's consideration to New Haven should properly take * * *."[12] The Court of Appeals decision reversing the New Haven Reorganization Court's Order of Remand provides:

> "This case must be remanded to the Commission so that a reorganization plan, fair and equitable to all parties, can be formulated. One of the main reasons for the enactment of §77 was to establish a reorganization procedure in which an expert agency would examine the technical and financial problems of the railroad and propose a reorganization plan to the reorganization court for approval. As both the Penn Central and the New Haven are in reorganization, at least nominally, before courts in different circuits, the Commission is the common denominator between those courts so far as the formulation of a single plan, or two interrelated plans, is concerned. Whatever protection the New Haven estate must receive in terms of some senior position in the Penn Central proceeding must first be proposed by the Commission in the context of a reorganization plan for the Penn Central which, it is to be hoped, will advance the public interest by successfully establishing a financially viable Penn Central. The Commission has stated that, if the proceeding is remanded to it, it will consolidate the Penn Central reorganization and New Haven inclusion proceedings so as to consider the terms of the New Haven inclusion as 'a portion of the reorganization of Penn Central * * *' This procedure is, we believe, the proper method by which the interests of all parties—the New Haven estate, Penn Central and its creditors, and the public—can best be advanced."[13]

12. 399 U.S. at 489.

13. —— F. 2d at —— (A. 18-19).

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Clearly it is the Court of Appeals decision remanding the case directly to the Commission, and not the New Haven Reorganization Court's Order of Remand, which correctly carries out the mandate in the *New Haven Inclusion Cases, supra.*

2. *The Constitutional Rights of the New Haven Creditors*

The New Haven Trustee argues that the *New Haven Inclusion Cases, supra,* held that "the New Haven creditors have suffered all the losses they were required to suffer in the public interest and that any further losses would be an unconstitutional taking of their property without just compensation * * *."[14] He also states that the equitable lien and constructive trust were appropriate security devices to prevent further losses and an unconstitutional taking.

The argument is fallacious in two respects. First, the losses referred to in the *New Haven Inclusion Cases* were losses suffered by the New Haven estate because of its unprofitable operation of the New Haven as a railroad in the public interest. That operation ceased on December 31, 1968, when the New Haven transferred its railroad to Penn Central. Thereafter it was and still is Penn Central and its creditors who are suffering the losses incurred in the operation of the former New Haven rail assets.

Secondly, the equitable lien and the constructive trust are not appropriate security devices since they violate not only Section 77(a), but also the New Haven Reorganization Court's own order of December 24, 1968 approving the

14. New Haven Trustee's Petition, p. 21.

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transfer of the New Haven assets to Penn Central. There the New Haven Reorganization Court ordered "a binding transfer" of the New Haven assets to Penn Central "free and clear of all liens, charges and encumbrances thereon."[15] The order provided that the various liens, charges and encumbrances to which the transferred assets had been subject prior to conveyance "shall attach and be recognized as continuing liens, charges and encumbrances upon the assets hereafter held by the New Haven Trustees," which included the consideration paid by Penn Central.[16]

The equitable lien and the constructive trust, interfering as they do with the assets transferred from the New Haven to Penn Central, violate the New Haven Reorganization Court's own order approving the transfer "free and clear of all liens, charges and encumbrances."

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15. Paragraphs J and K of Order No. 559, which we have printed in its entirety as an appendix to this brief, were quoted at pp. 7-8 of the New Haven Trustee's Petition. Paragraph H of Order No. 559 provides:

> "The conveyance of the Debtor's assets to Penn Central Company pursuant to the Plan shall be *a binding transfer* to Penn Central Company *free and clear of all liens, charges and encumbrances* thereon except as specified in Section 3.2 of the Purchase Agreement as modified with regard to the Harlem River Division mortgage and bonds and approved in the Plan; the liens, charges and encumbrances to which the Debtor's assets are subject prior to the conveyance of such assets shall attach and be recognized as continuing liens, charges and encumbrances upon the assets hereafter held by the New Haven Trustees, including all assets on deposit in the registry of this Court, all as provided in the Plan." (Emphasis added)

16. Paragraph L of Order No. 559 set forth in the Appendix hereto.

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3. *Warren* v. *Palmer*

The Court of Appeals held that *Warren* v. *Palmer*, *supra*, was determinative,[17] concluding that the New Haven Reorganization Court's Order on Remand "could * * * seriously impair the formulation of a workable plan for the financial resuscitation of Penn Central by the Commission and the ability of the Pennsylvania reorganization court to administer the entire Penn Central system, of which the New Haven line is but a division * * *."[18]

The New Haven Trustee argues that there was no showing that any such impact had occurred.[19] Reference to the New Haven Reorganization Court's Order on Remand refutes this contention. The operative provisions of the Order of Remand do not merely declare the equitable lien, they also direct the Penn Central Trustees to hold the Grand Central Terminal properties in trust for the benefit of the New Haven and to accrue for the account of the New Haven one-half the excess income from those properties.

This is precisely the sort of interference with the operations of a railroad in reorganization to which *Warren* v. *Palmer* applies. The existence of the Order on Remand, we submit, constitutes impermissible encroachment on the Penn Central Reorganization Court's Section 77(a) jurisdiction.

Nor does the statement of the New Haven Reorganization Court in its Memorandum of Decision that "* * * this

17. —— F. 2d at —— (A. 13).

18. —— F. 2d at —— (A. 16).

19. New Haven Trustee's Petition, p. 26.

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court claims only the power to declare the existence of an equitable lien on the conveyed property, including a constructive trust to the extent of the capitalized value of one-half of the excess income from the Grand Central properties * * *. [T]he New Haven reorganization court does not under the present circumstances assert the power to enforce such a lien."[20] As United States courts are not normally given to knowingly making unenforceable declarations, one can question this distinction which the New Haven Reorganization Court makes between its power to declare and its power to enforce. Such questioning is not necessary however—it is the Order of Remand with its clear-cut directions to the Penn Central Trustees which restricts their management of Penn Central, and it is the Order of Remand which the Court of Appeals reversed.

4. The Equities

Throughout his Petition the New Haven Trustee has sought to create the impression that the Penn Central's other creditors are being unjustly enriched at the expense of the New Haven and that the New Haven Reorganization Court is the only tribunal which can effectively protect the New Haven's right. A return to reality seems justified.

After the December 31, 1968 transfer of the rail assets of the New Haven to Penn Central, the New Haven estate's principal assets were securities—bonds, stock and Penn Central's promise to underwrite the value of the stock—of Penn Central. As long as Penn Central remained solvent, the New Haven Trustee had the right, as a Penn Central security holder, to require Penn Central to live

20. 330 F. Supp. at 137 (A. 30).

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up to the terms of those securities. He could enforce that right in the New Haven Reorganization Court or any other court where Penn Central could be served.

On June 21, 1970, when the Penn Central entered reorganization in the Penn Central Reorganization Court, that Court and that Court alone acquired jurisdiction over the assets of Penn Central. All claims on those assets had to be made before the Penn Central Reorganization Court so that it could apportion equitably the limited assets of the Penn Central estate among the various claimants to those assets.

No greater demonstration can be made of the soundness of Section 77(a) in bestowing upon a reorganization court exclusive jurisdiction over the property of a debtor in reorganization than the example of the encroachment on the Penn Central Reorganization Court's exclusive jurisdiction by the New Haven Reorganization Court in its Order of Remand.

Notwithstanding that the New Haven Reorganization Court was sitting as a court of equity, it ignored consideration of the relative merits of the claims of all creditors of Penn Central. Instead, it considered only the merits of the unsecured claim of the New Haven Trustee which the New Haven Reorganization Court, by its Order of Remand, elevated to secured status.

It is not surprising that most creditors of Penn Central did not appear in New Haven and did not attempt to justify the merits of their claims against Penn Central before the New Haven Reorganization Court. They undoubtedly as-

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sumed that their claims would eventually be weighed by the Penn Central Reorganization Court. It is surprising that the New Haven Reorganization Court chose to ignore this vast body of claimants, many of whom may be entitled to the same solicitous consideration which the New Haven Reorganization Court reserved for the New Haven Trustee.

As Manufacturers Hanover informed the New Haven Reorganization Court in its Statement of Position, the Grand Central Terminal properties are pledged to it, as Trustee under the 1897 Mortgage. Any order of the New Haven Reorganization Court diverting the excess income of the Grand Central Terminal properties to the New Haven Trustee would violate the rights of 1897 Mortgage bondholders who are entitled to the full security of the pledge of the Grand Central Terminal properties. Whatever may have been the rights of the New Haven Trustee in the Grand Central Terminal properties vis-a-vis the rights of Penn Central as successor to the Central, those rights are clearly subordinate to the rights of Manufacturers Hanover, as Trustee of the 1897 Mortgage, to the full security of the pledge of the Grand Central Terminal properties.

There was not in the record before the New Haven Reorganization Court one shred of evidence which even suggests that the rights of the New Haven Trustee to the Grand Central Terminal properties are superior to the rights of the 1897 Mortgage Trustee. There is nothing in the record before this Court to suggest that the New Haven Reorganization Court, which has ignored the claims of Manufacturers Hanover, as Trustee for the holders of bonds secured by the 1897 Mortgage, and which has apparently been unconcerned over the plight of any other Penn Central

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creditor except the New Haven Trustee, is better equipped than the Penn Central Reorganization Court to dispense equitably the limited assets of Penn Central to those creditors entitled to them. Section 77(a), the decisions interpreting Section 77(a), and common sense all compel the conclusion that the Penn Central Reorganization Court is the only tribunal which, in the first instance, has or should have the power over the assets of Penn Central.

Conclusion

Petitioners have not shown any reasons for granting the writ; certiorari should be denied.

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Dated: May 26, 1972

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APPENDIX

APPENDIX

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Order No. 559

IN THE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

In Proceedings for the Reorganization of a Railroad

In the Matter of
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Debtor.

No. 30226

ORDER DIRECTING INCLUSION OF DEBTOR IN PENN CENTRAL COMPANY

The Interstate Commerce Commission (the Commission) having certified to this Court, on December 2, 1968, a Plan of Reorganization for the Debtor (the Plan), as embodied in its reports and orders of November 16, 1967 and March 1, 1968 which have been modified in accordance with its report and order of November 25, 1968, together with exhibits and a transcript of the proceedings before the Commission; this Court having, by Order of December 3, 1968, directed the filing of objections and claims for equitable treatment on or before December 16, 1968, and scheduled hearings on the Plan commencing December 20, 1968; notice of said Order of December 3, 1968 and of the hearings thereon having been duly given in accordance with said Order; all parties in interest having been given due opportunity to file their objections in writing to said Plan and their claims

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for equitable treatment; the Court having, at the hearing on December 20, 1968, limited said hearing to the issue of the inclusion of the Debtor's railroad operations in Penn Central Company on or before January 1, 1969 by conveyance of the Debtor's assets to Penn Central Company and payment of consideration therefor by Penn Central Company, as specified in the Plan, subject to the jurisdiction reserved in this Order; all parties in interest having been heard or given opportunity to be heard on said issue; and this Court having filed its opinion in the premises,

THE COURT FINDS AS FOLLOWS:

1. Due and lawful notice to all persons and parties has been given in strict compliance with the Order of this Court of December 3, 1968 prescribing the manner of notice.

2. Subject to the jurisdiction reserved herein, the inclusion of the Debtor's operations in Penn Central Company as of December 31, 1968 in accordance with the Plan is fair and equitable, and otherwise fully complies with the requirements of Section 77 of the Bankruptcy Act, including subsections (b) and (e) thereof.

3. The Debtor is insolvent within the meaning of Section 77(e) of the Bankruptcy Act, and the equity of the holders of the Debtor's preferred and common stock and certificates of beneficial interest has no value.

4. Inclusion of the Debtor's operations in Penn Central Company as of December 31, 1968 by conveyance of the Debtor's assets and payment of the consideration specified in the Plan, subject to the jurisdiction reserved herein, will not adversely and materially affect any class of stockholders or of creditors of the Debtor's estate, except that under Section 77(e) of the Bankruptcy Act, the interest of the United States of America is deemed to be affected.

5. The United States of America has consented to the order of the Interstate Commerce Commission insofar as it relates to the conveyance of the Debtor's assets to Penn Central Company,

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New Haven Trustees, and the New Haven Trustees are authorized to receive, on the closing date provided in the Plan, to wit, December 31, 1968, the following consideration:

(1) 950,000 shares of Penn Central Company stock (plus such additional shares as may be necessary by the anti-dilution provisions approved by the Commission);

(2) $33,600,000 principal amount of Penn Central Company bonds;

(3) $8,000,000 in cash (less any amount representing accrued vacation pay which the New Haven Trustees and Penn Central Company agree is to be assumed by Penn Central Company); and

Penn Central Company is further directed on December 31, 1968 to assume obligation and liability in respect of:

(a) the Debtor's equipment obligations;

(b) the Debtor's Harlem River Division mortgage and bonds;

(c) the mortgage, bonds and certificates of contingent beneficial interest when issued pursuant to the Plan of Reorganization of the Boston and Providence Railroad Corporation (B&P);

(d) the payment for publicly held shares of the Boston and Providence Railroad Corporation upon consummation of the Plan of Reorganization of the B&P; and

(e) such other obligations and liabilities of the Debtor or of the New Haven Trustees, all as are provided in the reports and orders of the Commission referred to herein; and

Penn Central Company is further directed, on December 31, 1968, to cancel and surrender to the New Haven Trustees all Certificates of the New Haven Trustees held by said Company to evidence loans to the New Haven Trustees.

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C. The New Haven Trustees and Penn Central Company are hereby authorized and directed to perform all obligations to be performed by them pursuant to the provisions of the Plan relating to the inclusion of the Debtor and of the operations of the B&P in Penn Central Company, including the making of adjustments on May 31, 1969, the post-closing adjustment date under the Plan, in such amounts as may be payable by the New Haven Trustees and Penn Central Company, respectively, on said date pursuant to Section 7 of the Agreement between the New Haven Trustees and the Pennsylvania Railroad Company and the New York Central Railroad Company, dated April 21, 1966, as amended (the Purchase Agreement).

D. The New Haven Trustees are authorized and directed to turn over to Penn Central Company on December 31, 1968 the operations of the B&P and all rights of the Debtor with respect to such operations, and Penn Central Company is directed to operate the B&P, subject to the reserved jurisdictions of the Commission and of this Court, pending consummation of the Plan of Reorganization of the B&P, the payment by Penn Central Company for the publicly held shares of the B&P, the conveyance of the assets of the B&P to Penn Central Company and the assumption by Penn Central Company of the obligations under the mortgage bonds and certificates of contingent beneficial interest to be issued pursuant to the Plan of Reorganization of the B&P, Penn Central Company to succeed to the rights of the New Haven upon consummation of said Plan.

E. The Clerk of this Court is directed forthwith to turn over to the New Haven Trustees for delivery to Penn Central Company on the closing date the following assets held in the registry of this Court:

(1) 5% Note of Railway Express Agency, Incorporated, in the principal amount of $1,272,284.02;

(2) $1,068,000 principal amount of The Providence Terminal Company 4½% First Mortgage Bonds;

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(3) 9,551 shares of stock of Providence and Worcester Railroad Company;

(4) 1,071 shares of stock of Norwich and Worcester Railroad Company;

(5) 3,364 shares of stock of Fruit Growers Express Company;

(6) 15,000 shares of stock of The New York Connecting Rail Road Company;

(7) 7 shares of stock of The Boston Terminal Corporation; and

(8) 15,000 shares of stock of New England Transportation Company and 6% demand note of said Company in the principal amount of $738,000.

F. The Trustees under the indentures of the Debtor's First and Refunding Mortgage and of the Debtor's General Income Mortgage are hereby directed to turn over and release forthwith to the New Haven Trustees for delivery to Penn Central Company on the closing date all securities held in pledge pursuant to said indentures including the following:

(1) 25,877 shares of stock of The Pullman Company;

(2) 400 shares of stock of South Manchester Railroad Company; and

(3) Voting trust certificate substituted for 91,344 shares of stock of Railway Express Agency, Incorporated, pursuant to Order No. 510 herein.

G. All persons, firms and corporations whatsoever, and wheresoever situated, located or domiciled are directed to turn over forthwith to the New Haven Trustees for delivery to Penn Central Company on the closing date any and all of the Debtor's assets held by them, in pledge or otherwise, which are to be conveyed to Penn Central Company pursuant to the Plan.

H. The conveyance of the Debtor's assets to Penn Central Company pursuant to the Plan shall be a binding transfer to

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Penn Central Company free and clear of all liens, charges and encumbrances thereon except as specified in Section 3.2 of the Purchase Agreement as modified with regard to the Harlem River Division mortgage and bonds and approved in the Plan; the liens, charges and encumbrances to which the Debtor's assets are subject prior to the conveyance of such assets shall attach and be recognized as continuing liens, charges and encumbrances upon the assets hereafter held by the New Haven Trustees, including all assets on deposit in the registry of this Court, all as provided in the Plan.

I. Upon inclusion of the Debtor in Penn Central Company, the New Haven Trustees shall be relieved of the duty to operate and manage the railroad and common carrier properties of the Debtor, including those railroad and common carrier properties operated by the Trustees under lease or other arrangement; and in all other respects, the Trustees shall have all of the authority hitherto granted them in these proceedings.

J. The conveyance of the Debtor's assets by the New Haven Trustees and the payment of consideration by Penn Central Company, as provided herein, shall be without prejudice to the right of any party to contest the fairness and adequacy of the consideration and the other terms of the inclusion of the Debtor's operation in Penn Central Company.

K. The Court hereby reserves jurisdiction to adjudicate all operations and claims for equitable treatment heretofore filed herein except that all objections to the inclusion of the Debtor's operations in Penn Central Company as of December 31, 1968 are hereby overruled and denied.

L. Upon receipt of the consideration to be paid from Penn Central Company, the Trustees shall forthwith deposit in the registry of this Court the stock and bonds of Penn Central Company received by them, pending further order of this Court upon notice to all parties, provided, however, that, until further order of the Court, the New Haven Trustees shall be entitled to receive directly payments of interest and dividends on such securities.

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M. The Clerk of this Court is hereby directed to transmit a certified copy of this Decree and of the Opinion of the Court hereon dated December 24th, 1968 to the Interstate Commerce Commission.

ENTER:

ROBERT P. ANDERSON
United States Circuit Judge,
sitting by designation.

Dated: December 24th, 1968.

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No. 71-14-01

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SUPREME COURT, U.S.

In The Supreme Court of The United States

October Term, 1971

IN THE MATTER OF
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR

RICHARD JOYCE SMITH, TRUSTEE OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR,

PETITIONER

v.

George P. Baker, Richard C. Bond, Jervis Langdon, Jr. and Willard Wirtz, Trustees of the Property of Penn Central Transportation Company, Debtor; Manufacturers Hanover Trust Company, as Mortgage Trustee; and Penn Central Transportation Company;

RESPONDENTS

REPLY BRIEF IN SUPPORT OF CERTIORARI

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Dated: June 7, 1972

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In The
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October Term, 1971

No. 71-14-01

IN THE MATTER OF
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR

RICHARD JOYCE SMITH, TRUSTEE OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR,

PETITIONER

v

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RESPONDENTS

REPLY BRIEF IN SUPPORT OF CERTIORARI

I. The Decision Below Presents Important Legal Questions That Should Now Be Settled By This Court.

The decision below is novel and unprecedented in that it strips the New Haven Reorganization Court of its reorganization jurisdiction and, also, of its power to protect the constitutional rights of the New Haven bondholders from further erosion in the Penn Central reorganization; misconstrues *Warren* v. *Palmer*, 310 U.S. 132; and, is generally significant in attempting to delineate the coordinate jurisdiction of two reorganization courts, each having "exclusive jurisdiction."

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Only this Court can construe its mandate with finality. It should do so now in order to protect the New Haven creditors, and to expedite the reorganization process.

In opposing certiorari, the Penn Central Trustees and Manufacturers Hanover Trust Company mainly argue the merits of the Court of Appeals' decision that the New Haven Reorganization Court lacked jurisdiction to enter its order of remand. Their briefs are tellingly limited in meeting the grounds stated in the Petition why, pursuant to Rule 19 of this Court, certiorari should be granted.

Respondents' only arguments which fairly pertain to the Rule 19 standards are that: the factual issues, but not the legal issues, are unique; no question of general importance under the bankruptcy laws is raised; and it is premature to consider the substantive issues.

1. That the facts are unique may readily be agreed; but they are all established of record. As to the issues of law, it must fairly be agreed that they are novel and of broad significance. Further, the nature of the questions and their litigation history categorically establish that only this Court may resolve them. Specifically, and apart from questions of general significance, the issues involved require an interpretation of this Court's own remand to one of two district courts, each of which has claimed exclusive jurisdiction under §77 of the Bankruptcy Act to decide the issues at bar.

The New Haven Reorganization Court's claim to jurisdiction is based upon the specifics of this Court's remand in the *New Haven Inclusion Cases,* 399 U.S. 392, and its own reservation of jurisdiction entered at a time when both the Interstate Commerce Commission (the "Commission") and the New Haven Reorganization Court considered that the public interest required a conveyance of the New Haven's assets before the intertwined terms of consideration and payment could be finally fixed. That reservation of jurisdiction was itself based upon the findings of this Court in the *Penn Central and N&W Inclusion*

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Cases, 389 U.S. 486, that Penn Central was unconditionally bound to meet terms of payment for the New Haven's assets ultimately determined by the Commission and the New Haven Reorganization Court as being fair and equitable under §77 (and §5 of the Interstate Commerce Act).

On the other hand, and based upon precisely the same opinion and remand of this Court, the Penn Central Reorganization Court claimed "exclusive jurisdiction" pursuant to §77 over the same former New Haven assets, and construed the remand to the New Haven Reorganization Court actually as ousting the New Haven Reorganization Court from all jurisdiction. (See appendix to brief of Penn Central Trustees.) The Court of Appeals for the Second Circuit reached the same result but on an entirely different theoretical basis. It considered that *Warren v. Palmer, supra*, wholly ousted the New Haven Reorganization Court from jurisdiction under §77 and vested it solely in the Penn Central Reorganization Court, notwithstanding the duties of the New Haven Reorganization Court under §77 to make specific findings regarding approval (or rejection) of a reorganization plan, to confirm a plan, to consider so-called "cram-down" provisions in the event of adverse votes, and to oversee the steps leading to consummation of the plan. At the same time, however, the Court of Appeals made it clear that it did not disagree with the equitable protection deemed necessary by the New Haven Reorganization Court in its limited exercise of jurisdiction.

The Penn Central Reorganization Court, in asserting its jurisdiction, unequivocally entertained and sanctioned a collateral attack by the Penn Central Trustees on the judgment of the New Haven Reorganization Court in direct conflict with, and disregard of, the specific holdings of this Court in such cases as *Durfee v. Duke*, 375 U.S. 106; *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371; *Treinies v. Sunshine Mining Co.*, 308 U.S. 66; and *Stoll v. Gottlieb*, 305 U.S. 165.

These sweeping issues stem from the unique fact that

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the New Haven creditors were *compelled* to stand by, because of public interest considerations, while the property that comprised their entire security was ordered to be conveyed to Penn Central. It may be granted that it was reasonable at that time for the Commission and the Courts to assume that the transaction would be carried out on a basis approved after full judicial consideration. However, at the time when Penn Central became bankrupt, the transaction had not been completed. It is in the executory nature of the transaction that the basic and troublesome questions of jurisdiction of two federal district courts under §77 have their genesis.

Thus, both the underlying questions of fact and law are unique, and the questions of law raised by the decision of the Court of Appeals here sought to be reviewed are precisely defined, novel, and of current and substantial importance, as hereinafter discussed.

2. With respect to the general importance of the questions involved in the Petition, the significance of the pending number of reorganizations under §77 of the Bankruptcy Act cannot be disparaged, as suggested by the Penn Central Trustees, in weighing the importance of a resolution of the jurisdictional meaning of *Warren v. Palmer, supra*. Not only must jurisdictional boundaries and the New Haven's rights be resolved as set forth in the Petition, but questions of "exclusive jurisdiction" also exist in other pending reorganizations under §77; for instance, in the reorganization of Lehigh Valley Railroad Company, a subsidiary of Penn Central. In that case, questions of "exclusive jurisdiction" already exist for the respective creditors of Lehigh Valley and Penn Central where the same district court (in fact, the same judge) has "exclusive jurisdiction" over conflicting claims in the two reorganizations.

3. Respondents' contentions that a present review of the issues would be premature, at worst, endorse a philosophy of adjudication by postponement, and at best, have only circumstantial relation to a determination whether the Peti-

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tion should be granted. The hard facts are that there is now outstanding a judgment of the New Haven Reorganization Court which held not only that it had jurisdiction, but that equity required the New Haven creditors to be secured by an equitable lien and constructive trust for the payment found by this Court in the *New Haven Inclusion Cases, supra*. Whether the Penn Central Reorganization Court would ever reach the same result, or whether the New Haven Trustee would have an opportunity at some undefined future occasion to claim such protection, has no bearing on determination of the Petition. The constitutional significance to the New Haven creditors now to be made secure in their right to payment, no matter what form the payment may eventually take as a consequence of a Penn Central reorganization plan approved by the Penn Central Reorganization Court, may not fairly be gainsaid. It is no answer to the New Haven creditors that the Petition should be denied because, although the Penn Central Reorganization Court sanctioned a collateral attack on the judgment of the New Haven Reorganization Court, it voluntarily provided the New Haven Trustee with "a lien, indeterminate in amount and indeterminate as to priority" (Penn Central Trustees' brief, 21a), pending some future determination.

4. As noted above, respondents' briefs deal principally with the merits of the decision of the Court of Appeals. In that context certain of the arguments particularly require factual clarification.

At page 15 of the Penn Central Trustees' brief, it is stated that no one appealed the order of the New Haven Reorganization Court which provided for conveyance of the New Haven's assets to Penn Central "free and clear of all liens, charges and encumbrances." In fact, that provision was conditioned upon specific exceptions, including reservation of the right of New Haven creditors to litigate the terms and of the court to adjudicate the issues so raised. Of primary significance is that the quoted language was necessarily required to be contained in the order so

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that the specific terms of the plan of reorganization which the Commission had certified to the New Haven Reorganization Court could be executed without any hiatus in the transportation services provided to the public by the New Haven. Without such provision there could have been no conveyance pursuant to the plan by January 1, 1969, when the New Haven's operations were scheduled to cease. The reason why the New Haven interests did not appeal from that order was that the specific conditions expressly provided by the New Haven Reorganization Court, with the concurrence of the Commission, were that the "free and clear" conveyance was "without prejudice to the right of any party to contest the fairness and adequacy of the consideration and the other terms of the inclusion." (Order No. 559, December 24, 1968; Manufacturers' brief, 7A). As pointed out by the New Haven Reorganization Court, furthermore, the form of the conveyance did not "constitute a waiver of the chancellor's equitable lien or a bar to his power to create one" (New Haven Trustee's Petition, A43).

At page 16 of the Penn Central Trustees' brief, it is stated that the decision of the Court of Appeals "is in accord with the only previous decision by this Court dealing with a conflict between the respective jurisdictions of two Section 77 reorganization courts," citing *Warren v. Palmer, supra.* The decision of the Penn Central Reorganization Court, attached to the Penn Central Trustees' brief, and cited by them as a principal basis for denial of certiorari stated, however: "Since the case [*Warren v. Palmer*] involved largely post-bankruptcy issues, and liens which were necessary for the continued operation of rail service, the decision is not directly apposite" (Penn Central Trustees' brief, 14a).

At pages 17-18 of the Penn Central Trustees' brief, it is claimed that this Court remanded the *New Haven Inclusion Cases* "to the Commission and the appropriate federal courts." This characterization is a travesty of the actual order of this Court, dated June 29, 1970, filed in the United States District Court for the District of Connecti-

cut on July 31, 1970, in which it was stated: "These causes be and they hereby are remanded to the United States District Court for the District of Connecticut for further proceedings in conformity with the opinion of this Court."

At page 19 of the Penn Central Trustees' brief, it is stated "in fact, however, the New Haven Reorganization Court reserved jurisdiction only to pass upon objections to the amount and the form of consideration *which had been previously filed with the court.*" As previously noted, however, the New Haven Reorganization Court provided, as a basic condition of its order, that the conveyance and the payment of consideration were to be without prejudice to the right of any party not only to contest the fairness and adequacy of the consideration, but also "the other terms of the inclusion of the Debtor's operations in Penn Central Company" (Manufacturers' brief, 6A).

II. Counter-Statement of Pertinent Facts.

The facts of this case are not disputable. Petitioner believes, however that the factual summary contained in the Penn Central Trustees' brief is inaccurate in a number of instances of significance to the Court's consideration of the Petition; and, accordingly, brings the following to the Court's attention.

Purchase agreement was never approved by New Haven Reorganization Court.

1. At pages 3-4 of the Penn Central Trustees' brief, in the discussion of the effect of the purchase agreement among the Pennsylvania Railroad, the New York Central Railroad and the New Haven Trustees, no reference is made to the fact of record (previously recognized by this Court, 399 U.S. at 410, n. 46) that the New Haven Reorganization Court never approved the purchase agreement. Further, although the purchase agreement had been approved by the Commission, that approval was specifically conditioned upon an approval by the New Haven Reorganization Court (327 I.C.C. 475, 553 (1966)).

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"Free and clear" transfer was subject to reserved jurisdiction.

2. At page 5 of the Penn Central Trustees' brief, the order of the New Haven Reorganization Court approving the transfer to Penn Central "free and clear" is noted simply to have been with certain unspecified exceptions. In fact, the New Haven Reorganization Court made the entire transfer subject to the condition that the "conveyance of the Debtor's assets by the New Haven Trustees and the payment of consideration by Penn Central Company, as provided herein, shall be without prejudice to the right of any party to contest the fairness and adequacy of the consideration and the other terms of the inclusion" (¶J, Manufacturers' brief, 6A). In addition, the New Haven Reorganization Court also reserved jurisdiction to adjudicate all objections and claims theretofore filed, except those going to the fact of inclusion itself (¶K, Manufacturers' brief, 6A).

Furthermore, it is relevant to these facts that, although it was unconditionally bound to include the New Haven's properties, Penn Central sought a stay of such order from a three-judge district court, notwithstanding that it provided for a "free and clear transfer," specifically on the basis that the matters covered by the reservations of jurisdiction should be resolved before Penn Central should be required to carry it out.

Increase in purchase price was due to Commission's undervaluation of assets.

3. At page 5 of the Penn Central Trustees' brief, it is stated that the New Haven Reorganization Court increased the consideration which "Penn Central was to pay for assuming the New Haven's deficit operations." There was, in fact, no payment of any kind for New Haven's *operations* (399 U.S. at 482); the $29 million increase in purchase price ordered by the New Haven Reorganization Court related to the Commission's undervaluation of the

assets which Penn Central received at liquidation value, discounted for the costs of a liquidation. As this Court pointed out in the *New Haven Inclusion Cases*, "we thereby accord the bondholders the right to a liquidation and a per parcel sale that is theirs by virtue of their mortgage liens" (399 U.S. at 489-490).

Underwriting plan was to assure full payment of purchase price.

4. At page 5 of the Penn Central Trustees' brief, it is stated that the New Haven Reorganization Court "devised a so-called 'underwriting plan' to cushion the New Haven estate against a decline in the value of Penn Central common stock below $87.50 per share." The stock has never reached that price. As put by this Court, in analyzing the underwriting plan (399 U.S. at 487, 488): "In sum, the reorganization court devised a plan that added to its assessment of present worth both a reasonable assurance of realization of such worth and the opportunity of additional gain."

This Court was referring to Penn Central's bankruptcy in recognizing the impact of recent events upon the uncompleted purchase transaction.

5. At page 7 of the Penn Central Trustees' brief, it is implied that, when this Court referred in its opinion to "the impact of recent events," it intended to refer to the reduction in the market price of Penn Central common stock on the New York Stock Exchange between January 2, 1969 and May 30, 1970. The finding of the New Haven Reorganization Court was that this Court was referring to the filing by Penn Central of a petition for reorganization under §77 which occurred only eight days prior to the entry of this Court's opinion, and which was specifically referred to at the outset of the Court's opinion.

New Haven Reorganization Court considered Penn Central bonds and stock in relation to payment of purchase price.

6. At page 9 (¶2) of the Penn Central Trustees' brief, the New Haven Reorganization Court's Order of Remand is summarized as having given no credit whatever for the Penn Central bonds and stock received by the New Haven Trustee. In fact, the New Haven Reorganization Court provided that such bonds and stock would be held as security "and to the extent such security is liquidated or is retained under a plan of reorganization, Penn Central shall be credited with the fair value thereof" (New Haven Trustee's Petition, A64). Furthermore, the New Haven Reorganization Court provided that the purchase price due the New Haven would be reduced by all interest and dividends received by the New Haven on such bonds and stock *(Ibid.)*.

New Haven Reorganization Court did not attempt to set aside purchase and sale of assets.

7. At page 9 (¶3) of the Penn Central Trustees' brief, it is stated that the New Haven Reorganization Court "purported to set aside the purchase and sale of the New Haven assets." There is no such indication anywhere in the Memorandum of Decision or the Order of the New Haven Reorganization Court (New Haven Trustee's Petition, A25-A65), and no such inference may fairly be drawn.

"Related proceedings in the Philadelphia Court" constituted an improper collateral attack.

8. At page 10 of the Penn Central Trustees' brief, reference is made to "related proceedings in the Philadelphia Court." No mention is made that such proceedings were instituted by petition of the Penn Central Trustees on June 17, 1971 (the Memorandum of Decision of the New Haven Reorganization Court having been entered on June 11, 1971) collaterally attacking the decision of the New Haven Reorganization Court.

CONCLUSION

Petitioner submits that, for the reasons stated in his Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner,
Richard Joyce Smith

Dated: June 7, 1972

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In The
Supreme Court of The United States

October Term, 1972

No. 71-1401

IN THE MATTER OF
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD
COMPANY, DEBTOR

Richard Joyce Smith, Trustee of the Property of The New York, New Haven and Hartford Railroad Company, Debtor;

Petitioner

v

George P. Baker, Richard C. Bond, Jervis Langdon, Jr. and Willard Wirtz, Trustees of the Property of Penn Central Transportation Company, Debtor; Manufacturers Hanover Trust Company, as Mortgage Trustee; and Penn Central Transportation Company;

Respondents

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

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Dated: October 13, 1972

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Supreme Court of The United States

October Term, 1972

No. 71-14-01

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COMPANY, DEBTOR

Richard Joyce Smith, Trustee of the
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Petitioner

v

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and Willard Wirtz, Trustees of the Property of
Penn Central Transportation Company, Debtor;
Manufacturers Hanover Trust Company, as Mortgage
Trustee; and Penn Central Transportation Company;

Respondents

**ON PETITION FOR CERTIORARI TO
THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT**

PETITION FOR REHEARING

Richard Joyce Smith, Trustee of the Property of the New York, New Haven and Hartford Railroad Company, Debtor ("Petitioner"), respectfully petitions the Court as follows:

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1. On April 28, 1972, Petitioner filed a Petition for Certiorari to the United States Court of Appeals for the Second Circuit (the "Second Circuit Petition"), Docket No. 71-14-01.

2. On August 30, 1972, because of companion facts and issues, Petitioner also filed a Petition for Certiorari Before Judgment to the United States Court of Appeals for the Third Circuit (the "Third Circuit Petition"), Docket No. 72-356.

3. The Third Circuit Petition involves a decision of the United States District Court for the Eastern District of Pennsylvania entered in direct conflict with the judgment of the United States District Court for the District of Connecticut. The judgment of the District Court for Connecticut is the subject of the Court of Appeals decision treated with in the Second Circuit Petition. On the merits, the two petitions involve substantially identical issues. In addition, the conflict in the district court decisions raises separate, important issues of *res judicata* presented in the Third Circuit Petition but not in the Second Circuit Petition.

4. On October 10, 1972, apparently prior to consideration of the Third Circuit Petition, this Court denied the Second Circuit Petition.

5. Because of the procedural posture of the two cases, the interrelationship of the underlying facts, and the bearing upon disposition of the Second Circuit Petition of the pending Third Circuit Petition, appropriate consideration of the questions involved in the Second Circuit Petition fairly require its consideration together with the Third Circuit Petition.

WHEREFORE, this Court should grant rehearing of the Second Circuit Petition in order to consider it concurrently with the Third Circuit Petition, and should grant certiorari in both cases.

Respectfully submitted,

Of Counsel:

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JAMES WM. MOORE

JOSEPH AUERBACH
Attorneys for
Richard Joyce Smith, Trustee

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CERTIFICATE OF COUNSEL

I, Joseph Auerbach, counsel for Richard Joyce Smith, Petitioner, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2 of the Rules of this Court.

.....

Joseph Auerbach

Counsel for Richard Joyce Smith,
Petitioner

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